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No.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MARTIN MARIETTA CORPORATION,
Petitioner,

v.

WILLIAM C. POLLARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. When in an effort to persuade a prosecuting attorney to settle a case, an attorney cites witness statements elicited in the course of his investigation, describes what the witnesses will testify to, and notes the lack of evidence he has found to support the prosecution's theories, does that attorney thereby waive both the attorney-client and work product privileges so that his undisclosed notes, memoranda and transcripts of interviews are thereby rendered discoverable by third-parties?

2. In applying *United States v. Nobles*, 422 U.S. 225 (1975), are attorney notes, transcripts of interviews conducted by counsel, and interview summaries prepared by counsel, all of which reflect counsel's questions and litigation concerns, to be considered *non*-opinion work product and subject to discovery without any showing of substantial need?

PARTIES TO THE PROCEEDINGS BELOW

This case arises from a civil contempt proceeding in connection with a criminal case, *United States v. Pollard*, Crim. No. Y-87-0142, pending in the District of Maryland. The United States has been party to all the proceedings below, although it did not file briefs before the District Court or the Court of Appeals addressing the issues raised by this petition.*

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* Petitioner and Respondent, as captioned, are the principal parties. Martin Marietta's Rule 28.1 statement accompanied its request to enlarge time and is on file with the Clerk of the Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Martin Marietta Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit dated September 6, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals dated September 6, 1988 is reported at 856 F.2d 619 (4th Cir. 1988) and is set forth in the Appendix at 1a-15a. The district court order holding petitioner in contempt and the order and opinion of the district court directing petitioner to disclose the privileged documents to respondent are not reported and are set forth in the Appendix at 18a, 19a and 21a-31a, respectively.

JURISDICTION

The opinion of the Court of Appeals was issued and judgment entered on September 6, 1988. A timely petition for rehearing was denied on October 14, 1988 (App. 16a). This petition is filed within ninety days of the denial of the petition for rehearing.[1] The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves the ability of counsel to argue the facts to his opponent in an effort to settle potential litigation. The Court of Appeals held that in so arguing, counsel can refer to his client's statements, and the conclusions of his own investigative activities as to the existence or absence of evidence to support his opponent's theories, only if he is willing to waive the attorney-client and work product privileges with respect to the "underlying details" of his investigation. Because the decision below will have an immediate, chilling effect on the willingness of counsel to document client and client employee interviews, and because it creates an artificial and inappropriate restriction on the efforts of both defense and prosecuting counsel to resolve cases short of trial, Martin Marietta has petitioned for certiorari.

Background And Facts

In October 1984, Martin Marietta Corporation ("Martin Marietta" or "Company") became concerned about possible litigation with the United States as a result of critical newspaper publicity concerning an arrangement it had created for obtaining airline travel services. Re-

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[1] In order to avoid any possible difficulty in determining whether this petition was subject to the 60-day limitation period applicable to "judgments in criminal cases" or to the 90-day period applicable in all other cases, Martin Marietta filed a protective motion for extension of time. On November 25, 1988, the Chief Justice granted the requested extension to and including January 12, 1989. App. 34a.

spondent, William C. Pollard, was a Martin Marietta employee and President of the Martin Marietta subsidiary that had responsibility for such services. After the publicity, Martin Marietta's General Counsel tried to learn the facts necessary to provide legal advice to Martin Marietta's senior management and to prepare for litigation.

In November 1984, a grand jury served subpoenas *duces tecum* on Martin Marietta, its subsidiary, and certain employees. Martin Marietta retained outside counsel. Counsel conducted a detailed internal investigation, including interviews with Martin Marietta employees—some on more than one occasion—as counsel tried to learn the facts and marshal evidence to rebut anticipated government charges that certain aspects of the travel arrangement had defrauded the United States Department of Defense. Among the materials generated during this period were handwritten attorney notes of the interviews, counsel's memoranda about those interviews and transcriptions of recorded, extended interviews in which counsel discussed facts and probed the veracity and recollection of various employees. These materials were maintained confidentially and never disclosed to the government.

By July 1986, the grand jury had focused on specific targets, including Martin Marietta and Pollard. Martin Marietta's counsel tried to persuade the United States Attorney not to bring criminal charges. The United States Attorney invited counsel to submit its arguments in writing. Counsel then drafted and submitted a "position paper" that was a "written presentation discussing the factual and legal issues raised by" the grand jury investigation (App. 30a) and submitted pursuant to the understanding, recounted in the cover letter, that the submission would not be used against the Company or any of the individuals involved. App. 35a. The position paper included counsel's report of verbatim statements

by one Company employee tending to refute the government's charges as well as general assertions, based upon counsel's investigative efforts, about what the evidence would ultimately demonstrate and how witnesses would testify. App. 30a. At the request of the United States Attorney, the position paper was supplemented in November 1986.

Martin Marietta's attempt to persuade the United States Attorney not to pursue criminal charges was largely unsuccessful. Martin Marietta ultimately settled with the United States Attorney upon a plea of guilty to a three-count information. That plea was entered on February 11, 1987. App. 5a.

Proceedings Below

Pollard was indicted on April 7, 1987. App. 2a. On June 1, 1987, he subpoenaed fifteen categories of documents from Martin Marietta. Martin Marietta ultimately provided documents with respect to two of the categories but resisted production of certain other documents. App. 2a. Specifically, citing the attorney-client and work product privileges, Martin Marietta resisted production of: (1) internal audit documents collected and generated in anticipation of litigation; (2) notes, memoranda and transcripts of interviews of employees conducted by counsel during the grand jury investigation; and (3) documents related to the negotiation of an agreement whereby Martin Marietta avoided debarment from doing business with the federal government as a result of its felony conviction. App. 2a-3a.

Pollard moved to compel. App. 21a. Martin Marietta resisted on the grounds that the subpoena did not meet the requirements of Fed. R. Crim. P. 17(c) as described in *United States v. Nixon*, 418 U.S. 683 (1974), and that most of the documents were protected by the attorney-client and work product privileges. App. 22a. After an *in camera* review of the documents, the dis-

trict court substantially upheld Mr. Pollard's subpoena. The district court found that the subpoena was a good faith effort to obtain relevant and admissible evidence. App. 24a.

Without questioning the fact that the interview notes, memoranda and transcripts were protected by the attorney-client and work product privileges, the district court nonetheless required those materials to be provided to Pollard. The court held that the attorney-client and work product privileges had been waived by Martin Marietta's submission of the position paper to the United States Attorney in the course of its efforts to persuade the United States Attorney to dispose favorably of the case. App. 31a-33a. The district court found it "inappropriate to limit [the Company's] waiver of its privileges to the information it has disclosed to the government." App. 30a. The district court concluded that the waiver extended to all the supporting materials as well—in this case, the detailed attorney memoranda and transcripts of the attorney interviews that were generated as part of the attorneys' investigation—and that these materials must therefore be provided to Pollard. App. 32a-33a. When Martin Marietta declined to produce the documents, it was held in contempt and fined $1,000 per day. App. 18a. Martin Marietta appealed.

In regard to the attorney-client privilege, the Court of Appeals emphasized (as had the district court, App. 30a-31a) that the position paper contained assertions by counsel such as: "of those consulted within the Company all will testify that . . ." and "there is no evidence, testimonial or documentary, that any company officials . . . ," and held that such representations about the state of the evidence waived the attorney-client privilege as to the "underlying details" upon which those assertions were based.[2] App. 8a.

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[2] All the privileged documents requested by the respondent would appear to fall within the term "underlying details." The breadth

In regard to attorney work product, the Court of Appeals held that by providing the position paper to the United States Attorney, Martin Marietta had made a "testimonial use" of the work product which resulted in an implied waiver of the work product privilege, citing *United States v. Nobles*, 422 U.S. 225 (1975). App. 11a. Again relying on *Nobles*, the court rejected the argument that the waiver should extend only to what had been disclosed, holding instead that in light of the "promise of completeness to induce an adversary to settle . . . the subject matter of the disclosure and the waiver is comprehensive, and includes *all* of the company's non-opinion work product relating to the investigation that it conducted." App. 12a (emphasis added). Although the Court of Appeals referred to "completeness," that conclusion was apparently drawn from the context (settlement) and the statements concerning what "all" the witnesses would testify about. App. 12a.

In sustaining generally the district court's broad disclosure order, the Court of Appeals noted that waiver under *Nobles* did not extend to statements of "pure legal theory or opinion" and "pure mental impressions." App. 12a. Nonetheless, the court made it clear that in this setting, attorney memoranda and transcripts of attorney examinations of company employees—reflecting the questions asked by counsel and factual theories and weaknesses that counsel wished to pursue—would have to be produced to Pollard as not falling within the definition

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of the disclosure under this rule is emphasized by the district court's holding that "underlying details" includes

> communications relating the data, the document, if any, to be published containing the data, all preliminary drafts of the document, and any attorney's notes containing material necessary to the preparation of the document.

App. 31a, quoting *United States v. (Under Seal)*, 748 F.2d 871, 875 n.7 (4th Cir. 1984).

of "opinion" (*i.e.*, "pure" opinion) that it adopted for these purposes.[3] App. 12a-13a, 14a-15a & n.2.

REASONS FOR GRANTING THE WRIT

This case presents important questions about the ability of attorneys to argue for the disposition of a case short of trial without thereby surrendering the attorney-client and work product privileges. On several occasions, this Court has addressed the significant role these privileges play within our adversary system and in the administration of justice in the federal courts. Of no less importance, either to our adversary system or in the administration of justice, is the right and ability of counsel to argue to his adversary, on behalf of his client, that charges threatened against his client are unjustified, improper, and should not be pursued, in other words, that the case should be settled.

The decision below is almost certainly wrong for it penalizes attorneys and their clients for having documented their investigative efforts and attorney-client communications, on the one hand, and for then engaging in frank discussions with opposing counsel in an attempt to settle cases, on the other. In so doing, the decision below denigrates not only the attorney-client and work product privileges, but an explicit federal policy favoring frank and open settlement negotiations.

Beyond its unfortunate practical consequences, the decision below applies the waiver doctrine in a manner that strips it of any logical rationale or policy justification. Thus, both the district court and the Court of Appeals

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[3] The Court of Appeals also affirmed the district court's holding that the information was the proper subject of a Fed. R. Crim. P. 17(c) subpoena under the standards set forth in *Nixon*. App. 6a. Although the case below involved multiple objections to several categories of documents, this petition concerns only the notes, memoranda and transcripts of interviews conducted by counsel which are protected by the attorney-client and work product privileges.

relied upon cases holding that when a party attempts to make a "testimonial use" of privileged material as a sword in the courtroom, flaunting some privileged matter before the finder of fact, that party may not use the privilege to shield additional information on the same subject that the fact-finder needs to make a fair determination. That principle has no logical application here. If the United States Attorney was dissatisfied with the selective disclosure he received, and wanted to see more of the "underlying details," he was free to request them and, if he didn't get what he wanted, to not settle as he saw fit. There was, and could be, no unfairness. And Pollard himself could not have been misled by the disclosure of information—whether partial, selective, or highly selective—to another person in another litigation. Thus, the unique considerations that created the need to find implied waivers in the courtroom are not found here.

The decision below is inconsistent with the cases of this Court upon which it purports to rely. In finding a broad waiver of the privileges in an attorney's reference to facts he has found and his belief as to what his witnesses would testify, the analysis applied by the court below is at odds with *Upjohn Co. v. United States*, 449 U.S. 383 (1981), which reaffirmed the breadth of both privileges and the absence of justification for circumscribing their reach. More directly, in finding a "testimonial use" of work product in the context of settlement discussions, the opinion below carries *United States v. Nobles*, *supra*, a case involving the affirmative use of work product in the courtroom, far beyond its facts—to a setting in which frank factual interchange between parties should be encouraged, not punished.

Whether correct or incorrect, the decision below will have a direct and immediate impact on the way attorneys represent their clients. Fear of subsequent disclosure may prevent counsel from conducting, or at least, fully documenting their investigations. Even more immedi-

ately, by limiting the range of informal advocacy and informational exchange that attorneys can engage in, and which frequently results in the pretrial settlement of civil and criminal cases, the decision below will frustrate both defense counsel and prosecuting attorneys in their attempts to resolve cases short of trial.

An attorney that curbs his settlement discussions in light of the now wholly justifiable concern that by engaging in those discussions in a forthright manner he will waive the privileges associated with his own investigation, will be unable to seek review of the rule to which he has bowed. Neither will the prosecuting attorney, who is also deprived of the benefit of those discussions, be able to mount a challenge to this decision.

In short, the decision below will have immediate and significant effects on the conduct of many cases, but if this petition is not granted the rule it establishes will likely evade review. Even if the chilling effect of this decision were not sufficient to ensure adherence to its terms by counsel unwilling to risk waiver—thus constraining settlement efforts in many cases without any opportunity for judicial review of the rule itself—privilege issues typically arise in connection with discovery disputes, which seldom make their way past the trial court to present issues for appellate consideration. Therefore, unless the petition is granted, the decision below is likely to be as persistent as it is incorrect, impeding for some time to come the prompt disposition of litigation in the federal courts.

I. The Petition Should Be Granted To Decide The Important Question Whether The Attorney-Client And Work Product Privileges Are Broadly Waived By Arguing One's Facts To One's Adversary

Federal law recognizes two privileges indispensable to our adversary system. *First* is the absolute privilege covering attorney-client communications. Its purpose is "to

encourage full and frank communications between attorneys and their clients and thereby promote . . . [the] administration of justice." *Upjohn Co.*, 449 U.S. at 389. *Second* is the qualified work product privilege that protects the interview memoranda, notes, communications and other writings prepared by counsel for his own use in prosecuting his client's case. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947). Its purpose is to provide a "certain degree of privacy" in which counsel may prepare his case, thereby encouraging counsel to pursue all avenues of inquiry even though some may prove fruitless, or worse, detrimental. *Id.* at 511.

The Court has read both privileges broadly to achieve their purposes. In *Upjohn*, the Court rejected a view of the attorney-client privilege that would have limited the privilege in the corporate setting to communications with the so-called "control group." In *Hickman*, the Court held that the work product privilege covered all materials generated by counsel in anticipation of litigation. In both cases, the Court rejected the argument that a broad view of the privileges would permit counsel to hide facts from an adversary. On the contrary, the adversary always remains free to interview the same people, review the same documents, and do his own analysis, *see Upjohn*, 449 U.S. at 395-96; *see also Hickman*, 329 U.S. at 513, and therefore stands in no worse position because of the privilege.

One of the principal objectives of the privileges is, of course, to allow counsel "to present his client's case in the most favorable possible light." *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984). Fulfilling this responsibility ordinarily requires counsel to obtain a complete, unblemished account from his client. This task necessarily requires him to question—vigorously and skeptically—the factual foundation of even his own client's statements and beliefs. *See Hickman*, 329 U.S. at 511. Counsel's efforts, concerns, and theories are re-

flected in transcribed interviews, memoranda, notes and in "countless other tangible and intangible ways." *Id.* If investigative efforts are to be pursued diligently, those efforts must be preserved from disclosure.[4]

Advocacy is not, however, limited to the courtroom. An attorney is frequently called upon to persuade a po-

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[4] Uncertainty as to when the privileges may be lost may "instill an undesirable caution" in counsel. *See FTC v. Grolier Inc.*, 462 U.S. 19, 31 (1983) (Brennan, J., concurring). This case caps a series of inconsistent lower court cases that have made the issue of waiver a paradigm of uncertainty.

Although the cases do not parse neatly, it is fair to say that one line of cases holds that disclosure of some material results in loss of privilege with respect to related, undisclosed documents and information. *See In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) ("any voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter"); *see also In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982); *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981); *In re Weiss*, 596 F.2d 1185 (4th Cir. 1979); *AMCA Int'l Corp. v. Phipard*, 107 F.R.D. 39 (D. Mass. 1985); *IBM Corp. v. Sperry Rand Corp.*, 44 F.R.D. 10 (D. Del. 1968).

Another line of cases holds that—absent some unfairness—waiver is limited to the actual documents or information disclosed. *See In re von Bulow*, 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged attorney-client communications in a book is a waiver as to that disclosure but did not extend to undisclosed portions of the same conversations or to other conversations on the same subject); *United States v. Aronoff*, 466 F. Supp. 855 (S.D.N.Y. 1979) (waiver limited to the very information disclosed during a settlement discussion or proffer); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 45-46 (D. Md. 1974) (same); *American Optical Corp. v. Medtronic Inc.*, 56 F.R.D. 426, 431-32 (D. Mass. 1972) (same). *See also Diversified Industries Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (disclosures to federal agencies should be encouraged; any waiver is limited to the government agency involved); *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679 (S.D.N.Y. 1980); *In re Grand Jury Subpoena dated July 13, 1979*, 478 F. Supp. 368 (E.D. Wis. 1979).

tential opponent of the correctness of his client's position. That process of persuasion will frequently include recounting the facts to his adversary as his client has recounted them to him. At the heart of the settlement process are statements like these: "Well, I understand how your client feels about it, but my client says that it didn't happen that way. He says that your client . . .", or, "Mr. Jones told me that he is going to contradict those statements and he and his fellow employees will testify that . . .", or "I've been through my client's records and talked to all of his people and I haven't heard anything that supports your statement that . . .", and "We just can't find any evidence that supports your theory that . . ." If counsel were not free to make such statements, without fear that the protection of the attorney-client and work product privileges would thereby be lost as to his undisclosed investigative efforts, meaningful settlement discussions, addressing the factual meat of a dispute, could not be pursued.

This informal dispute resolution process must operate smoothly and without constraint if the formal adjudicatory structure is not to be overwhelmed by cases that could well be resolved short of trial. It is for this reason that the federal courts have long recognized a policy encouraging settlements.[5] For precisely the same reason, the federal rules embody the understanding that unrestrained candor—what the Advisory Notes to the Federal Rules of Evidence refer to as "freedom of communication with respect to compromise"—is essential to effective civil and criminal settlement negotiations. The Federal Rules, therefore, expressly limit the evidentiary use of factual assertions made in the course of settlement discussions, overriding the contrary common law

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[5] *See Williams v. First National Bank*, 216 U.S. 582, 595 (1910). *See also United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977); *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976).

rule. *See* Fed. R. Evid. 408. *See also* Fed. R. Evid. 410 (3); Fed. R. Crim. P. 11(e)(6) and the Advisory Committee Note to 1979 Amendment.[6]

The decision below—which by its logic applies every bit as much to civil as to criminal cases, and to oral as well as written statements—penalizes counsel for engaging in the very type of forthright settlement discussions that the federal rules encourage. The decision below imposes an "unjustifiable restraint upon efforts to negotiate settlements," and reestablishes "a preference for the sophisticated, and a trap for the unwary" in negotiating toward settlement. *See* S. Rep. No. 1277, 93d Cong., 2d Sess. 10 (1974).

The trap created by the Court of Appeals' decision is all the more lethal because it rests on no plausible foundation. At issue here is not the information actually revealed to opposing counsel, but undisclosed information and documents.[7] Whatever conceptual arguments can be made for the idea that a privilege cannot attach to documents and information disclosed to another party[8] do

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[6] At common law, the protection given offers of compromise did not extend to factual statements made in the course of such discussions. In extending protection to such statements, Congress recognized that the common law rule "hamper[ed] free communication between parties" and constituted an "unjustifiable restraint upon efforts to negotiate settlements." The common law nuance, requiring attorneys to address the facts in hypotheticals was, therefore, expressly rejected. S. Rep. No. 1277, 93d Cong., 2d Sess. 10, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7057.

[7] The subpoena at issue in this case did *not* seek the position paper that Martin Marietta gave to the United States Attorney; nor would a subpoena seeking the position paper likely have been successful. *See* Fed. R. Evid. 408; Fed. R. Crim. P. 11(e)(6) (submissions not admissible); *compare United States v. Nixon, supra* (only admissible evidence may be sought by subpoena).

[8] *E.g., Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, 91 F.R.D. 84, 90 (E.D.N.Y. 1981); *but see Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977)

not support the further idea that the privileges should be lost for documents and information that have never been disclosed. In fact, whatever fairness concerns might suggest that where a partial disclosure would otherwise mislead an opponent and, therefore, he should be entitled to more, those concerns can have no application at all to the request of a third party, such as Pollard. Finally, as to the theoretical argument that by revealing one's evidence, or describing expected testimony of his client, an attorney breaches the confidentiality of attorney-client communications, it is sufficient to say that attorneys make such revelations daily, not only in settlement discussions, but in discovery responses, pretrial memoranda and briefs, opening arguments and in countless other litigation settings. No one has suggested that such disclosures waive the attorney-client or work product privileges.

The rule announced by the court below is thus extremely broad in both its immediate practical effect and in its doctrinal implications.[9] Not surprisingly, it is also in marked tension with the reasoning of this Court in the very cases upon which it purports to rest.

(en banc) (waiver of privilege by disclosure to government agency is limited to the government; important policy favoring disclosure militates against a general waiver as to third parties of the information disclosed).

Whatever the precise scope of privilege in connection with such limited disclosure, the evidentiary use of submissions of this kind is largely governed by rule. *See* Fed. R. Crim. P. 11(e)(6). In this respect, the decision below appears to create an obvious anomaly. The actual submission to the United States Attorney, which arguably is not "confidential" precisely because it was disclosed, is probably not discoverable. But the submission to the United States Attorney, under the protection of the federal rules, has been held by the court below to waive the applicable privileges generally so that the privileged material that was maintained confidentially must be revealed to third parties.

[9] The difficulty faced by attorneys in light of this rule is not limited to the Fourth Circuit. As noted above, the law is decidedly

A. The Decision Below Is At Odds With *Upjohn's* Treatment Of The Attorney-Client And Work Product Privileges

In *Upjohn*, outside counsel conducted an internal corporate investigation to determine whether criminal conduct had occurred. At the conclusion of the investigation, the company disclosed the results in a report to the Securities and Exchange Commission with a copy to the Internal Revenue Service ("IRS").[10] In response to an IRS summons, counsel declined to provide the questionnaire responses, interview notes, and memoranda that contained the details underlying the report.

This Court rejected the restricted view of the attorney-client privilege urged by the IRS. Given the important policies underlying the privilege and the fact that the privilege does not leave the adversary in any "worse position than if the communications had never taken place," 449 U.S. at 395, the Court did not hesitate to grant the privilege a broad sweep.

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unsettled in this area and the nature of the issue often precludes effective appellate review. Thus, the issue has defied clarification in the Courts of Appeals. More immediately, regardless of the jurisdiction in which an attorney finds himself engaged in settlement discussions, he will know that if his client could end up in a follow-on civil suit in the Fourth Circuit, he will be found to have waived his privileges by his earlier discussions.

[10] In *Upjohn*, the government argued that this disclosure had waived the attorney-client privilege with respect to the questionnaires and interview notes. This Court acknowledged the waiver issue (449 U.S. at 388) but did not address it directly even though the government had urged it in its brief. The issue left open in *Upjohn* is closely related to the issue presented here, and the issue of waiver has continued to plague the lower courts.

Commentators have noted that *Upjohn*'s failure to address the waiver issue has resulted in substantial confusion in the lower courts. *See* Crisman & Mathews, *Limited Waiver of Attorney-Client Privilege and Work-Product Doctrine In Internal Corporate Investigations: An Emerging Corporate "Self-Evaluative" Privilege*, 21 Am. Crim. L. Rev. 123, 146 (1983).

The same reasoning that supports a broad reading of the scope of the privilege also supports a narrow reading of the circumstances under which waiver will be found. Nothing in the privilege doctrine prevents the adversary from making full inquiry into the underlying facts. Thus, there is little reason to find implied waivers that have the principal effect of allowing one attorney to bootstrap on the diligent, and presumptively confidential, efforts of another.[11] In fact, the policies supporting a broad reading of privilege in *Upjohn* are supplemented here by the strong and explicit federal policy favoring candid discussions in connection with the settlement of cases, unencumbered by the kind of "trap for the unwary" that this case creates.

The Court of Appeals did not state the rationale for the broad subject matter waiver rule that it applied. Certainly, there was no waiver in the sense of voluntarily or knowingly relinquishing a known legal right.[12] Nor was there a waiver in any other sense. To be sure, one of the elements of the attorney-client privilege is confidentiality, and to the extent a communication is not confidential, it is not protected. But this means only that information actually disclosed to the United States Attorney is not privileged. It should not mean that all related documents, containing undisclosed information on the same subject, lose their privilege.[13] It assuredly should not mean that when counsel says that he has

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[11] As Justice Jackson pointed out in *Hickman, supra*, "Discovery was hardly intended to enable a learned profession to perform its function . . . on wits borrowed from the adversary." 329 U.S. at 516 (Jackson, J., concurring).

[12] In fact, as shown on the face of the transmittal, Martin Marietta submitted its position paper upon the express understanding that the submission of that document would not waive any applicable privileges. App. 35a.

[13] *See generally Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450, 1645 and 1654-55 (1985).

heard nothing from his client that supports the prosecutor's theories, that attorney may then be compelled to reveal everything that his client told him in the course of his investigation.

If an attorney's statements during settlement discussions provide a clue to his adversary about a source of additional evidence or information, the adversary is, of course, free to pursue those leads. *See Upjohn*, 449 U.S. at 395-96. It is no secret that one of the reasons that prosecutors encourage position papers of the kind sought here is because of the leads such submissions provide to further sources of evidence and the defense's theory of the case. But the right to follow-up on such leads has never been thought to create a right to inquire about what the attorney was told by his client or to the documents created by the attorney in the course of his own investigative efforts.

The Court of Appeals here may have been referring to "waiver" in a different, but no more apposite sense. When a party puts at issue his or her own attorney-client communications, as by raising advice of counsel as a defense, he thereby "waives" the privilege that otherwise attaches to those communications. As this Court stated in *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), once the defendant had placed his or her communications with counsel at issue, the privilege "cannot be insisted on to close the mouth of the attorney." The nature of the adjudicative process requires that result.

Nothing about settlement discussions between adversaries suggests the need for a similar requirement. There is no general rule of completeness that requires an advocate to reveal the bad, as well as the good, in the course of arguing with his adversary for a settlement. If the United States Attorney was unhappy with the position paper, or if he simply wanted to have more of the underlying details, he was free to ask for them. If

he did not get the information that he considered satisfactory, he could ignore the submission and proceed with the case as he originally intended.

In fact, even if there were such a rule of "completeness" that applied outside of the courtroom, respondent here could not have taken advantage of it. Respondent was not the recipient of the position paper and was in no position to have been misled by it.[14]

B. The Decision Below Takes *Nobles* Outside The Courtroom And Far Beyond Its Logic

1. *There Was No Testimonial Use of Work Product Here*

The Court of Appeals cited *Nobles* in support of its holding that by referring to counsel's view of the evidence and the expected testimony, Martin Marietta had made a "testimonial use" of its work product materials, thereby waiving the work product privilege as to the underlying details of the attorneys' investigation. Nothing in *Nobles* supports that reasoning.

In *Nobles*, an investigator interviewed certain witnesses at the direction of counsel shortly after the robbery at issue. The investigator "preserved the essence of" those interviews in his report, which he submitted to counsel. 422 U.S. at 227. After that counsel called his investigator to testify about those interviews, the district court held that the portions of the investigator's report that contained statements that might impeach his testimony would have to be disclosed.

In affirming, this Court held that the work product privilege was waived with respect to the investigator's prior written report on "matters covered in his testimony." 422 U.S. at 239 & n.14. The Court emphasized

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[14] Moreover, the position paper was transmitted under the express understanding that the position paper would not be used against the company or the individuals involved. App. 35a.

the "quite limited scope" of the lower court's holding in permitting the government access only to specific portions of the report. 422 U.S. at 240. The Court noted that all that was involved was non-opinion work product, the factual statements of the investigator, not the work of counsel. The Court thus found a waiver only to the extent necessary to correct a distortion to the adjudicatory process without seriously impinging upon the policies underlying the work product privilege.[15]

In reaching its result in this case, the Court of Appeals held that statements to an adversary in the course of settlement discussions involve a "testimonial use." But that conclusion is unsupported by the rationale of *Nobles*. In *Nobles*, the Court relied on the fact that the work product—the investigator's record of observations at the behest of counsel—was being used at trial, as part of the ultimate truth-finding process. The adjudicatory process demands that the fact-finder, being asked to form judgments about privileged communications, be allowed to hear the full story.

It is not immediately apparent why the unique considerations that require a finding of waiver where work product is affirmatively placed at issue in the courtroom should similarly require a finding of waiver where counsel cites his own efforts, conclusions and beliefs, as support for his client's position, outside of the courtroom. Discussions between adversaries in aid of settlement

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[15] The Court in no way indicated that it meant to reverse the generally accepted rule that "disclosure of some documents does not destroy work product protection for other documents of the same character." 8 C. Wright & A. Miller, Federal Practice and Procedure, § 2024 at 209 (1970). *See also* Note, *The Work Product Doctrine*, 68 Cornell L. Rev. 760, 888-93 (1983). Unfortunately, some courts have interpreted *Nobles* as establishing a "subject matter" waiver rule for work product. *See Chubb Integrated Systems v. Nat'l Bank of Washington*, 103 F.R.D. 52, 63 (D.D.C. 1984).

operate on very different premises than do courtroom presentations, suggesting that they are one of the least appropriate settings in which easily to imply waiver.[16] There is no hint of unfairness to an impartial fact-finder; there is no fact-finder. The United States Attorney in this case, or any other adversary, remains free to reject the asserted conclusions out of hand, or to insist upon more factual detail. We would expect some healthy degree of skepticism to be the rule in evaluating any such submission. But the illogic of the Court of Appeals' rationale is even more apparent on the facts of this case. Unlike the fact-finder in *Nobles*, or even the United States Attorney, Pollard is a third party who was not in danger of being misled by a document that he never saw and could not have relied upon.

2. *After Finding Waiver, the Court of Appeals Improperly Defined "Non-Opinion" Work Product Subject to That Waiver, Effectively Ordering Attorney Mental Processes To Be Revealed Without Any Showing Of Need*

After finding an implied waiver of the work product privilege with respect to the internal investigation, the Court of Appeals acknowledged that *Nobles* involved only non-opinion work product. Reasoning that the rule

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[16] The Court of Appeals based its conclusion on a three factor test that it found met here: (1) that the disclosure had been made to an adversary, (2) that the disclosure had been with an "express assurance of completeness;" and (3) that the disclosure was made in an attempt to settle. App. 12a. None of these factors embraces the basic issue of whether the disclosure could have any effect on the factfinder's judgment. Moreover, with respect to the second factor, there was no evidence whatsoever that there had been an "express assurance of completeness." The Court of Appeals apparently reached its conclusion on the basis of the conclusory statements in the position paper itself that "there is no evidence" or "all will testify." This factual error is of little consequence, however, since the court's entire test is divorced from the fundamental rationale underlying *Nobles*.

against disclosure of opinion work product is grounded (in these circumstances) on the principle that there is "little danger that a litigant will use a pure mental impression or legal theory as a sword or a shield in the trial of a case so as to distort the factfinding process," App. 14a, the Court of Appeals propounded an extraordinarily narrow view of "opinion" work product. The Court of Appeals thus declined to apply the concededly high standards set forth in *Upjohn* for determining when opinion work product may be discovered. 449 U.S. at 401-02. In this factual context, the Court of Appeals concluded that attorney notes of interviews and memoranda of witness statements, and even transcripts reflecting an attorneys' probing questions to his own client, would be treated as "*non*-opinion" work product. Consequently, only "pure" attorney statements of legal theory and "pure" attorney mental impressions need not be produced to Pollard. App. 15a.

Both *Hickman*, 329 U.S. at 512, and *Upjohn*, 449 U.S. at 399-401, strongly suggest a contrary conclusion: "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." 449 U.S. at 399. And nothing in *Nobles* argues for a special definition of opinion work product that restricts it to only "pure" expressions of opinion. Whether "pure" or not, attorney mental impressions—including questions posed to a client, reflecting the counsel's concerns—are entitled to protection because in our adversary process we recognize that attorneys must be free to pursue their inquiries without restraint, and thus without fear of disclosure except in the most extraordinary circumstances.

In *Upjohn*, this Court held that "work product based on oral statements . . . which reveal the attorneys' mental processes" can only be obtained upon a "far stronger showing than" would be necessary under the "substantial

need" and "without undue hardship" test applied to other forms of work product. *Upjohn*, 449 U.S. at 401. The material at issue here reveals those mental processes in precisely the way that *this* Court described, but did not meet the purity test added by the court below.[17] Through the restrictive definition of "opinion work product" that the court below developed for waiver cases, the opinion of the Court of Appeals effectively circumvents the requirement that some strong and urgent need for an attorney's opinion work product be shown before it can be ordered disclosed.

II. If The Petition Is Not Granted, The Questions Presented May Otherwise Escape Meaningful Review

In the face of this decision, it will be the unusually fearless (or foolhardy) attorney that will be willing to engage in forthright discussions of the evidence with opposing counsel.[18] That attorney will know that such discussions may open the door to discovery and disclosure of his own investigation as the "underlying" source of the evidence that he has argued to his opponent. As here, the door will be opened not only to his adversary in the immediate suit, but also to those who might bring civil actions (whether under the securities laws, or the anti-

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[17] An attorney's interview questions reveal the subjects that he is interested in, as well as his concerns with the case. Accordingly, transcribed or videotaped interviews are regarded as opinion work product. *Motley v. Columbia Broadcasting Systems*, 94 F.R.D. 733, 735 (N.D. Ind. 1982); *Ford v. Philips Electronics Instruments Co.*, 82 F.R.D. 359, 360 (E.D.Pa. 1979). There is little question that an attorney's contemporaneous notes of his interviews also reflect those mental processes.

[18] The decision below creates an obvious reason to disdain documentation and recording of discussions with clients in the form of memoranda and transcriptions in favor of reliance on counsel's memory alone. Concern for this result was among the reasons this Court reaffirmed the work product privilege in *Hickman, supra*, 329 U.S. at 511 ("much of what is now put down in writing would remain unwritten").

trust laws, or any other laws) in the wake of a criminal prosecution.

Wise attorneys, in future cases, that curb their settlement efforts as a consequence of the rule established below, will not be able to challenge the rule to which they have bowed. Yet their clients may be irreparably prejudiced by counsel's inability to use his understanding of the facts to try to persuade a prosecutor not to indict, or a civil adversary not to commence suit. Neither will prosecutors, who frequently seek position papers of the kind submitted here—in order to learn of weaknesses in their case, or to gather intelligence about their opponent's theories—be in a position to challenge the rule established by the decision below. Yet, they too will be deprived of information that they would otherwise have, and denied the opportunity to conduct forthright factual discussions with defense counsel in an effort to resolve cases short of trial. In sum, the disposition of many cases will be affected by this rule, but the nature of the rule will allow few persons hereafter to challenge it.[19]

Even the hapless attorney who next falls into the "trap for the unwary" that this decision creates—by conducting a thorough investigation and then attempting to persuade an adversary to settle by referring to the results of that investigation—will not likely be able to bring a case to the attention of this Court. The path to review of an order to disclose privileged documents will ordinarily be

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[19] The decision below will plainly have an impact beyond the context in which it has arisen. Nothing in the reasoning of the decision below limits its application to the corporate context, "white collar crime," or even criminal (as opposed to civil) suit, or to written (as opposed to oral) assertions by counsel. Reporting upon the results of one's investigative efforts, or upon the statements of one's clients, is a pervasive aspect of settlement discussions designed to alert one's adversary, early on, to the flaws and pitfalls in his case—and thus of the reasons why he should settle. To burden that type of discussion with the fear that it will result in waiver of one's privileges is to ensure that such discussions are not conducted at all.

blocked by the obstacles to interlocutory appeal of discovery orders—the context in which issues like this most frequently arise.[20] Effective post-judgment review is even less likely because it is the rare case in which a judgment can be said to turn on a particular discovery ruling.

A collateral proceeding, such as this one, involving civil contempt, presents one of the few mechanisms by which the important and unresolved question presented by this case can reach this Court for consideration.[21] With this ruling on the ledger, however, and the issue now settled in the Fourth Circuit, no reasonable corporate executive can be expected to resist production of privileged documents, and thereby incur substantial fines[22] through the quixotic process of a futile appeal to the circuit court, in an effort to try to invoke discretionary review by this Court. Thus, as a practical matter, if the writ is not granted on this petition, many persons will be affected, and the unfortunate rule of this case firmly established, before this Court is next presented with an opportunity to address the important questions raised here.

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[20] For example, one can easily envision an attempt to obtain such attorney-client and work product documents in civil securities act cases or private antitrust suits, following upon criminal or administrative investigations.

[21] There is no dispute in this case on the issue whether the documents and information were privileged in the first instance. In addition, because the disclosure to the United States Attorney was made in writing, rather than orally, there are no lingering factual questions about what was disclosed or the circumstances of the disclosure. And because the case has arisen collaterally to the main action, matters of materiality, relevance and prejudice are not at issue. The case is, therefore, postured in such a way that the issue is especially well presented for consideration by this Court.

[22] Here, the fine imposed on Martin Marietta was $1000 per day. App. 18a.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3648

IN RE MARTIN MARIETTA CORPORATION,
Appellant,

UNITED STATES OF AMERICA,
Plaintiff

versus

WILLIAM C. POLLARD,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Joseph H. Young, Senior District Judge—(CR-87-142-Y)

Argued: April 8, 1988 Decided: September 6, 1988

Before WINTER, Chief Judge, and MURNAGHAN and ERVIN, Circuit Judges.

Brian Christian Elmer (Richard L. Beizer, Alan W. H. Gourley, Pauline E. Waschek, CROWELL & MOR-

ING; George Beall, MILES & STOCKBRIDGE; Frank H. Menaker, Jr., Jay A. Brozost, MARTIN MARIETTA CORPORATION on brief) for Appellant. Robert Harley Bear (James S. Maxwell, MAXWELL & BEAR on brief) for Appellee.

MURNAGHAN, Circuit Judge:

William C. Pollard, a former employee of Martin Marietta Corporation (Martin Marietta), is under indictment, returned April 7, 1987, by a grand jury of the District of Maryland on three counts. Count I alleges a conspiracy to defraud the Department of Defense (DOD), Counts II and III allege mail fraud. Pollard is charged with operating a scheme to characterize improperly travel cost rebates paid by travel agencies PTI and its subsidiary IVI (companies independent of Martin Marietta) to Maxim, a subsidiary of Martin Marietta, as fees rather than credits against travel costs. The overall effect was that Martin Marietta could overstate the costs for which it received reimbursement by the DOD.

On June 1, 1987, Pollard, under Fed. R. Crim. P. 17(c), subpoenaed Martin Marietta for the production of fifteen categories of documents. On June 12, 1987, Martin Marietta moved to quash. On July 2, 1987, the district court denied the motion to quash but also ruled that the subpoena was overly broad. The court limited the subpoena to uncontested items until the defense established a need for particularized items. On September 9, 1987, Pollard limited the scope of the contested items to six categories. At a hearing held the next day the district court allowed Martin Marietta several weeks to determine what documents it would voluntarily produce. On October 1, 1987, Martin Marietta agreed that it would produce the documents responsive to two of the six categories, would produce some of the documents requested under a third category, and had no documents requested under a fourth category. It refused to produce any items in the other two categories. Thus, three categories of documents remained in dispute. They were:

1. *Audit Papers.* Martin Marietta's corporate internal audit reports, workpapers and related supporting documentation (including internal memoranda and internal and external correspondence), covering and audits of Martin Marietta's subsidiary Maxim, and its relationship to travel companies IVI and PTI. [This is the category for which Martin Marietta made selected production.]

2. *Witness Statements.* Notes, transcripts and electronic recordings of interviews with and statements by William Pollard, Richard Westfall, Gregory Levins, John Rayburn, Peter Warren and James Simpson concerning the relationship of Martin Marietta, Maxim, IVI and PTI.

3. *Administrative Settlement Agreement Materials.* All correspondence and notes of unwritten communications to or from Martin Marietta and the United States Gvernment related to the Administrative Settlement Agreement between the company and the Defense Logistics Agency executed by the company on January 31, 1987.

On October 15, 1987, Pollard moved for an order to compel production of the items withheld by Martin Marietta. At Martin Marietta's request, the court committed itself to a two-step procedure: first, to require production of the documents at issue *in camera*; and second, to give the company another opportunity, after the court reviewed the documents, to argue against their production to Pollard. In the course of that procedure, Martin Marietta acknowledged that portions of some documents it sought to withhold had been earlier quoted in disclosures made by it to the Government, either or both the United States Attorney and the Defense Logistics Agency, part of the Department of Defense.

The district court ordered production of the documents at issue, with the exception of audit papers that had

already been made available to the defense, and certain documents relating to the Administrative Settlement Agreement that the court determined after its *in camera* review to be irrelevant. In its accompanying memorandum, the court described its basis for ordering the disclosure of the materials by category. A contempt order was issued when Martin Marietta failed to comply with the order of production.

Rule 17(c) implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor. *California v. Trombetta*, 467 U.S. 479, 485 (1984). Enforcement of a Rule 17(c) subpoena is governed by the standards established in *United States v. Nixon*, 418 U.S. 683 (1974). A party seeking pretrial production of documents must demonstrate (1) relevancy, (2) admissibility, and (3) specificity with respect to the documents. *Id.* at 700.

The district court correctly noted that *Nixon* requirements and then found that Pollard met them. Martin Marietta argues that the court misapplied the *Nixon* requirements. Its chief objection is that it thinks that the district court misapplied the admissibility criterion by improperly using a broad civil discovery standard rather than the narrower criminal evidentiary standard.

Martin Marietta has a heavy burden to meet on appeal.

> Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c).

Nixon, 418 U.S. at 702 (emphasis in original).

We turn to the three *Nixon* requirements. While Rule 17(c) is limited to evidentiary materials, that is not to say that the materials subpoenaed must actually be used in evidence. It is only required that a good faith effort be made to obtain evidence. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 219-20 (1951).

All the efforts to obtain material that Pollard makes come in a good faith effort to obtain evidence and the admissibility criterion of the *Nixon* requirements is thereby met. He seeks results of an internal audit. Since Pollard did not have direct contact with the DOD, the charge against him for defrauding the DOD is essentially a charge that he obstructed Martin Marietta's corporate internal audit of its subsidiary Maxim. The audit is clearly of evidentiary value. Pollard seeks interview notes, transcripts and electronic recordings concerning the audit. They are of evidentiary value. Pollard seeks correspondence and notes relating to the Administrative Settlement Agreement between DOD and Martin Marietta. They are of evidentiary value to Pollard's defense that he was made a scapegoat. Part of that administrative settlement was agreement by Martin Marietta no longer to fund Pollard's defense. Pollard was not indicted until after Martin Marietta had solved its problems: It pled guilty to criminal charges and administratively settled with the DOD. A subpoena of the administrative agreements is at least a good faith effort to acquire evidence by Pollard for a defense that Martin Marietta hung him out to dry while protecting its own interest.

The district court applied the correct standard for the second *Nixon* requirement: specificity with respect to the documents requested. It found that the requested materials: results of an internal audit, interview notes, transcripts, electronic recordings and correspondence relating to the Administrative Settlement Agreement between Martin Marietta and the DOD, were described with sufficient specificity. In that regard, we note that Pollard

had, at the district court's order, greatly limited the scope of documents sought.

While the district court did not make detailed findings regarding relevancy that requirement, the third of the three *Nixon* requirements, was met. Further, while the Supreme Court in *Nixon* established relevancy and admissibility as separate requirements, it seems that admissibility subsumes relevancy since one aspect of admissibility is relevance.

The district court concluded that the *Nixon* requirements were met. That conclusion was not an abuse of discretion and will not be disturbed. *Nixon*, 418 U.S. at 702.

Martin Marietta next argues that, even if the documents were within the scope of a Rule 17(c) subpoena, they are protected from disclosure by either or both of the attorney-client and work-product privileges. A subpoena *duces tecum* should be quashed or modified if it calls for privileged matter. C. Wright, Federal Practice & Procedure Criminal 2d § 275, at 162-163. Pollard argues that Martin Marietta in settling with the government both as to criminal charges and in the Administrative Settlement Agreement with the DOD impliedly waived the attorney-client and work-product privileges. There can be no dispute but that otherwise privileged materials were disclosed to the United States Attorney and the DOD. The issue is the extent of the implied waiver thereby created.

Implied waiver nullifies a privilege when disclosure of a privileged communication has vitiated confidentiality. Unlike express waiver which allocates control of the privilege between parties to the communication, implied waiver allocates control of the privilege between the judicial system and the party holding the privilege. Comment, *Developments—Privileged Communications*, 98 Harv. L. Rev. 1450, 1629-30 (1985).

Martin Marietta argues for application of a limited implied waiver as to both privileges. Most courts continue to state the rule of implied waiver in absolute form—any disclosure of a confidential communication outside a privileged relationship will waive the privilege as to all information related to the same subject matter. That is commonly referred to as subject matter waiver as opposed to limited waiver for which Martin Marietta argues. However, competing policy concerns, such as facilitating the settlement of litigation, permitting full cooperation among joint defendants, expediting discovery and encouraging voluntary disclosure to regulatory agencies have led courts to carve out exceptions to the purportedly absolute rule of waiver. Martin Marietta argues that an exception should be found in the present case so as to limit the waiver to the information that it actually disclosed to the government (copies of which Pollard has been provided) rather than implying a waiver as to all materials on the same subject as those provided the government.

The Fourth Circuit has previously rejected the limited waiver concept as to the attorney-client privilege and as to non-opinion work-product. We have embraced the limited waiver concept as to opinion work-product. Since, in the present case, we are unsure whether the documents ordered produced include opinion work-product, we remand the case to the district court to consider whether opinion work-product materials were included in the materials ordered produced. We agree that a subject matter waiver has been worked as to the attorney-client privilege and as to non-opinion work-product.

Attorney-Client Privilege.

The Fourth Circuit has not embraced the concept of limited waiver of the attorney-client privilege. It has held that if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as

" 'the details underlying the data which was to be published' " will not enjoy the privilege. *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984) (quoting *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984) (quoting *United States v. Cote*, 456 F.2d 142, 145 (8th Cir. 1972))).

The District of Columbia Circuit has had frequent occasion to consider the waiver resulting from disclosure of privileged material to the federal government and has likewise not embraced the concept of limited waiver as to the attorney-client privilege. *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984). In that case Tesoro Petroleum provided the Securities and Exchange Commission (SEC) with information regarding illegal foreign bribes in return for more lenient treatment from the SEC. Tesoro shareholders brought a derivative suit and sought the documents in discovery. The court rejected the limited waiver argument.

A similar result is required here. In September and November 1986 Martin Marietta submitted to the United States Attorney a Position Paper describing why the company should not face indictment. The paper contains assertions: "of those consulted within the Company all will testify that any qualms they had about the arrangement had nothing to do with worries about fraud" and "there is no evidence, testimonial or documentary, that any company officials in the meeting [of November 17, 1983] except Mr. Pollard and his Maxim employees, understood that Maxim had departed from the strict procedures of its IVI contract." Pollard's subpoena seeks in category 1 the audit papers and in category 2 witness statements from which the Position Paper statements were derived. Like the Fourth Circuit case of *In re Grand Jury Proceedings*, the Position Paper as well as the underlying details are no longer within the attorney-client privilege. Similarly and more clearly the disclosures made to the Defense Logistics Agency in the

Administrative Settlement Agreement and sought in category 3 are not privileged and are subject to disclosure under the subpoena. All that is sought with regard to the Administrative Settlement Agreement is the actual communications between Martin Marietta and the DOD. Thus, all the materials at issue in the present case are either information revealed to others or details underlying the data that was published. Accordingly, they do not enjoy an attorney-client privilege from disclosure under a Rule 17(c) subpoena.

The Work-Product Privilege.

While the attorney-client privilege is intended to promote communication between attorney and client by protecting client confidences, the work-product privilege is a broader protection, designed to balance the needs of the adversary system: promotion of an attorney's preparation in representing a client versus society's general interest in revealing all true and material facts to the resolution of a dispute. *United States v. Nobles*, 422 U.S. 225, 238 (1975); *In re Subpoena Duces Tecum*, 738 F.2d at 1371 (citing *Hickman v. Taylor*, 329 U.S. 495, 509-12 (1947)).

Nobles made clear that the work-product doctrine not only applies in criminal cases, but that it plays an even more vital role in criminal than in civil cases. *Id.* at 238. Nonetheless, the Court stated that it is only a qualified privilege subject to waiver. The signal feature of the implied waiver in that case, and in the one at bar, is the attempt to make testimonial use of work-product materials.

> What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances. Counsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining wit-

> nesses. When so used, there normally is no waiver. But where, as here, counsel attempts to make a testimonial use of these materials the normal rules of evidence come into play with respect to cross-examination and production of documents.

Id. at 239 n. 14.

In *Nobles* defense counsel hired a private investigator after the alleged crime, a bank robbery, had taken place. The investigator interviewed two witnesses, a bank teller and customer, both of whom were present during the alleged robbery, and preserved the essence of those conversations in a written report. At trial, the witnesses testified for the prosecution. Defense counsel relied on the investigator's report during their cross-examinations. Both witnesses denied having made statements to the investigator that cast doubt on their trial testimony. The Supreme Court indicated that up to that point no waiver of the work-product privilege was worked. *Nobles*, 422 U.S. at 239.

Defense counsel's next trial tactic changed that conclusion. Counsel sought to put the investigator on the stand and contrast his recollection of the contested statements with the recollections of the two witnesses. The trial court ruled that a copy of the entire portion of the investigator's report dealing with the statements would have to be submitted to the prosecution for inspection at the completion of the investigator's testimony. The defense chose not to disclose the report and suffered the consequence of not being allowed to have the investigator testify. The Supreme Court agreed with the trial court's ruling. The Court indicated that defendant, "by electing to present the investigator as a witness, waived the [work-product] privilege with respect to matters covered in his testimony." *Id.* at 239.

After the Court indicated that testimonial use of work-product implies a waiver, it spoke to the scope of that

waiver and rejected an argument for limited implied waiver such as that advanced by Martin Marietta in the present case. The Court indicated that the waiver created by testimonial use means that the normal rules of evidence with respect to cross-examination and production of documents apply; it did not simply indicate that the privilege was lost as to the matters actually disclosed.

Martin Marietta argues that the waiver should be implied only as to those work-product materials actually disclosed. The *Nobles* court did not agree.

If the Court had accepted an argument akin to Martin Marietta's in the *Nobles* case, it would have concluded that the privilege would be waived only as to the investigator's testimony on the witness stand (what was actually disclosed) rather than ruling that the waiver would encompass the entirety of the report from which the disclosures were drawn (data underlying the disclosure). Thus, if it had accepted the notion of implied waiver it would have found the district court in error since waiver should have applied only to the testimony, not the report.

We considered *Nobles* and the scope of an implied waiver of the work-product privilege in *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1222-23 (4th Cir. 1976). We bifurcated work-product into opinion and non-opinion work-product. We noted that *Nobles* dealt with non-opinion work-product and that *Nobles* had held that subject matter waiver applies to non-opinion work-product when testimonial use of non-opinion work-product is made.

We apply those principles of *Nobles* as interpreted by *Duplan* to the present case. Here, testimonial use has been made of non-opinion work-product. That was the factual situation in *Nobles*. We conclude that disclosure by Martin Marietta to the federal government, the

United States Attorney and the DOD, when the government and Martin Marietta were adversaries constitutes testimonial use. Three factors are important in that conclusion. First, we note that the federal government's and Martin Marietta's interests were decidedly adverse during the proceedings at issue. Martin Marietta faced criminal charges in the one instance and debarment from federal contracting in the other. We do not decide the issue of disclosures in less adverse circumstances like regulatory disclosures. Second, we note that Martin Marietta made an express assurance of completeness of its disclosure to the United States Attorney. Third, we note that the disclosures were made in a direct attempt to settle active controversies between Martin Marietta and the United States Attorney and the DOD. Not only was there not community of interest, the disclosures were made under promise of completeness to induce an adversary to settle. *See In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

Thus, Martin Marietta has impliedly waived the work-product privilege as to all non-opinion work-product on the same subject matter as that disclosed. The disclosure of Martin Marietta was made broad by its express assurance of completeness of its disclosure to the United States Attorney, so that the subject matter of the disclosure and the waiver is comprehensive, and includes all of the company's non-opinion work-product relating to the investigation that it conducted.

Counsel for Martin Marietta made oral representations in appellate argument that the district court's order encompassed materials involving pure legal theory or opinion. We realize that non-opinion work product necessarily will be reflective of a counsel's approach, but we think a distinction can be made between non-opinion work product, which may nevertheless be ordered produced if counsel has waived work product protection, and pure mental impressions severable from the underlying data and arguably not subject to subject matter

waiver. We understood counsel for Martin Marietta to represent that the district court's order encompassed items of pure opinion or legal theory that may be severed from the underlying information.[1] In light of these representations, we feel that it is incumbent upon us to decide a point of law we reserved in *Duplan*: whether subject matter waiver "applies with equal vigor to opinion work product." 540 F.2d at 1223 n.6. We hold that the doctrine does not apply to such materials.

We think that when there is subject matter waiver, it should not extend to opinion work product for two reasons.

First and most generally, opinion work product is to be accorded great protection by the courts. While certainly actual disclosure of pure mental impressions may be deemed waiver, and while conceivably there may be indirect waiver in extreme circumstances, we think generally such work product is not subject to discovery. While, as we recognized in *Duplan*, the Supreme Court's reasoning in *Nobles* necessarily implies that the privilege derived from the work product doctrine is not in all cases absolute, *see Duplan*, 540 F.2d at 1223, the plain language of Fed. R. Civ. P. 26(b)(3) suggests especial protection for opinion work product:

> In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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[1] Counsel for Pollard conceded in oral argument before this Court that it was not his original intent to subpoena documents containing, hypothetically, marginal notes written by an attorney to convey his own mental impressions or thoughts, distinct from, for example, notes and memoranda summarizing interviews with employees concerning the audit, but that the district court's order encompasses such statements, and that he now seeks them under the district court's order.

Secondly, the underlying rationale for the doctrine of subject matter waiver has little application in the context of a pure expression of legal theory or legal opinion. As we noted in *Duplan*, the Supreme Court applied the concept in *Nobles*:

> where a party sought to make affirmative testimonial use of the very work product which was then sought to be shielded from disclosure.

540 F.2d at 1223. There is relatively little danger that a litigant will attempt to use a pure mental impression or legal theory as a sword and as a shield in the trial of a case so as to distort the factfinding process. Thus, the protection of lawyers from the broad repercussions of subject matter waiver in this context strengthens the adversary process, and, unlike the selective disclosure of evidence, may ultimately and ideally further the search for the truth.

We therefore vacate the district court's order as to all items for which work product protection was claimed, and remand with instructions that the district court once again review these documents *in camera*. We think it proper for the district court, in the first instance, to conduct such a review. In so ruling, we recognize that the line between opinion and non-opinion work product can be a fine one.[2] But what should not be ordered to be

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[2] The distinction is recognized implicitly in Fed. R. Civ. P. 26(b)(3) and in practice should not present great theoretical difficulties. For example, in the instant case, Martin Marietta having quoted from some audit interviews, the transcript of these interviews has been waived under the broad doctrine of subject matter waiver. Similarly, work product protection has been waived as to most of the internal notes and memoranda on these interviews which, by way of summarizing in substance and format the interview results, Martin Marietta used as the basis of its disclosure to the government on its audit results. These are evidentiary materials, from which Pollard hopes to adduce evidence supporting his scapegoat theory. However, in disclosing such results, Martin Marietta apparently would not disclose nor would intend to dis-

disclosed are pure expressions of legal theory or mental impressions.

On remand, it will of course be Martin Marietta's burden of proof to demonstrate that the documents included in the district court's order include opinion work product. Martin Marietta must provide specific and detailed indications of where such work product is located in the documents in order to enable the district court to conduct an expeditious review and redact pure legal theories, impressions, or opinions in those documents or portions thereof that Martin Marietta has not actually disclosed to the government or others.

We therefore affirm the district court's order as to all documents for which work product protection was not claimed, and vacate as to all documents for which the work product privilege was claimed for further proceedings consistent with this opinion.[3]

VACATED AND REMANDED.

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close, hypothetically, marginal notations on such documents such as: "This person does not appear to be credible; let's not call him as a witness if we have to go to trial on this one." Such an expression of legal opinion, thus detached from the data which Martin Marietta did disclose, would not be subject to subject matter waiver.

[3] One final matter remains. The United States Attorney's office has written the court about the Position Paper presented to it. That office wants, regardless of outcome of the present case, to disclose it to Pollard, and asks that our order include permission for the government to do so. That decision of the United States Attorney is independent of the case at bar and we decline to render an opinion to the United States Attorney on whether to disclose it.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3648

IN RE: MARTIN MARIETTA CORP.,
Appellant,

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM C. POLLARD,
Defendant-Appellee.

On Petition for Rehearing with Suggestion
for Rehearing In Banc

[Filed Oct. 14, 1988]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Chief Judge Winter and Judge Ervin.

For the Court

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

MEMORANDUM AND ORDER

On November 13, 1987, the Court ordered Martin Marietta Corporation to disclose specific documents to counsel for William C. Pollard, no later than November 16, 1987, at 10:00 a.m. Martin Marietta Corporation has willfully disobeyed the Court's deadline for producing these discovery items. Therefore, pursuant to 18 U.S.C. § 401(3), it is this 16th day of November, 1987, by the United States District Court for the District of Maryland, ORDERED:

1. That Martin Marietta Corporation BE, and the same IS, hereby HELD in civil contempt;

2. That, pending compliance with the Court's Order of November 13, 1987, Martin Marietta Corporation BE, and the same IS, hereby FINED the sum of one thousand ($1,000) dollars per day until compliance; and

3. That a copy of this Memorandum and Order be mailed to counsel for the government, defendant, and Martin Marietta Corporation.

/s/ Joseph H. Young
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

ORDER

In accordance with the attached Memorandum, it is this 13th day of November, 1987, by the United States District Court for the District of Maryland, ORDERED:

1. That Martin Marietta Corporation BE, and the same hereby IS, directed to disclose to counsel for William C. Pollard, no later than Monday, November 16, 1987, at 10:00 a.m., the following items:

(a) the company's corporate internal audit reports, workpapers, and related supporting documentation covering the 1984 Maxim/IVI/PTI audit which have not been previously disclosed to defendant;

(b) transcripts and electronic recordings of interviews with and statements by William Pollard, Richard Westfall, Gregory Ferris [sic], John Rayburn, Peter Warren, and James Simpson concerning the 1984 Maxim/IVI/PTI audit and Maxim's relationship to IVI and PTI; and

(c) correspondence and notes of unwritten communications related to the administrative settle-

ment between the company and government in connection with the Maxim/IVI/PTI matter, excluding the Brozost material.

2. That a copy of this Memorandum and Order be provided to counsel for the government, defendant, and Martin Marietta Corporation by 2:00 p.m., Friday, November 13, 1987.

/s/ Joseph H. Young
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

MEMORANDUM

Presently before the Court is a motion to compel discovery. After receiving written memoranda, hearing counsel, and reviewing documents *in camera*, the matter is now ready for resolution.

Defendant William C. Pollard seeks disclosure of three categories of documents from Martin Marietta Corporation:

(1) the company's corporate internal audit reports, workpapers, and related supporting documentation covering the 1984 Maxim/IVI/PTI audit;

(2) transcripts and electronic recordings of interviews with and statements by William Pollard, Richard Westfall, Gregory Ferris [sic], John Rayburn, Peter Warren, and James Simpson concerning the 1984 Maxim/IVI/PTI audit and Maxim's relationship to IVI and PTI; and

(3) correspondence and notes of unwritten communications related to the administrative settlement between the company and government in connection with the Maxim/IVI/PTI matter.

Martin Marietta Corporation ("MMC" or the "Company") challenges Pollard's discovery request on several

grounds. First, it argues that it has already provided defendant with the internal audit report and supporting documentation relating to the Company's audit of Maxim requested in item 1 above; MMC notes that it has only withheld materials generated after it anticipated litigation concerning this matter.[1] MMC also contends that the notes, transcripts, and electronic recordings of interviews sought under item 2 above are inadmissible hearsay which do not fall within any of the recognized exceptions. Finally, the Company asserts that its correspondence and notes regarding MMC's negotiation of the Administrative Settlement Agreement requested under item 3 above are irrelevant to Pollard's conduct which is on trial.

Pollard contends that the materials sought are "evidentiary, highly relevant, and essential for defendant to properly present his case." The indictment charges Pollard with conspiring to defraud the Department of Defense by "impeding, impairing, obstructing and defeating the lawful governmental functions of the Defense Contract Audit Agency (DCAA)." Since defendant did not have any direct contact with DCAA auditors, he is essentially charged with obstructing MMC's corporate internal audit of its subsidiary Maxim, and its relationship to travel companies IVI and PTI. Thus, defendant seeks complete disclosure of the audit in question in order to properly defend himself.

Pollard also contends that the interview notes, transcripts, and electronic recordings are also discoverable because they may constitute evidence of a company-wide conspiracy to defraud the Defense Department, as well

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[1] In a November 5, 1987 letter, the Company asserts that all materials in item 1 (except folder 1) has [sic] already been made available to Pollard. It objects to further disclosure of the particular set of documents submitted to the Court because it would reveal the "mental process" of the Company's representatives and is opinion work product.

as identify the members of such conspiracy. Finally, defendant contends that the correspondence and notes relating to the Administrative Settlement Agreement place his prosecution in proper context since the government named him defendant after the Company pled guilty to felony charges and the government had given other individuals immunity for their cooperation.

The initial issue involved is whether this discovery is permissible under Rule 17(c) of the Federal Rules of Criminal Procedure. The United States Supreme Court has provided:

> [I]n order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'
>
> Against this background, [the moving party], in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity.
>
> * * * *
>
> Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c).

United States v. Nixon, 418 U.S. 683, 699-700, 702 (1974) (citations omitted).

The Court is satisfied that Pollard has satisfied the *Nixon* requirements for discovery pursuant to Rule 17(c). Thus, the critical inquiry is whether MMC may successfully assert the attorney-client privilege and work product doctrine to protect this disputed material from discovery.

The attorney-client privilege consists of the following elements:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

United States v. Board of Education of Chicago, 610 F. Supp. 695, 701 (N.D. Ill. 1985) (quoting 8 Wigmore § 2292). In the corporate context, the United States Supreme Court has applied the attorney-client privilege to protect information obtained in an internal company investigation from compelled disclosure where:

> (1) The communications at issue were made by [corporate] employees to [corporate] counsel . . . acting as such, at the direction of corporate superiors in order to secure legal advice from counsel; and
>
> (2) The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice; and
>
> (3) [T]he communications were considered 'highly confidential' when made, and [were] kept confidential by the company.

Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981). MMC argues that the interview notes, transcripts, and electronic recordings are protected by the attorney-client privilege because the Company complied with the requirements of *Upjohn*.

Pollard contends that MMC has attempted to use the attorney-client privilege to "manipulate and select the disclosure of the information gleaned during the company audit, for self-serving purposes" by having some witnesses give their statements to an auditor and having select other witnesses give their statements to the company's legal staff for "discrete and legally protected purpose[s]." Moreover, defendant argues that MMC has waived the attorney-client privilege by disclosing information designed to place blame on Pollard to the government which it now attempts to withhold from Pollard.

The Company also argues that the information sought in items 1 through 3 above is protected under the work product doctrine. The work product doctrine is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides in pertinent part:

> [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

MMC argues that Pollard seeks the most sensitive work product, namely counsel's mental impressions, conclusions, opinions, and legal theories regarding future litigation. The work product doctrine prohibits such disclosure. *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947). Once again, however, Pollard argues that MMC waived its work product privilege by making selective disclosures of the disputed information to the government while negotiating the Administrative Settlement Agreement.

The United States Court of Appeals for the District of Columbia has provided most of the case law addressing waiver of the attorney-client privilege and the work product doctrine. Its most recent case on this issue, *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984), provides a good summary of the court's previous holdings, most particularly, *United States v. American Telephone & Telegraph*, 642 F.2d 1285 (D.C. Cir. 1980); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981), and *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), and is applicable to the case *sub judice*. In *Subpoenas Duces Tecum*, Tesoro Petroleum Company provided the Securities and Exchange Commission (SEC) information regarding its alleged illegal payments to foreign officials under a "voluntary disclosure program," whereby the SEC provided Tesoro more lenient treatment and the chance to avoid formal investigation and litigation. 738 F.2d at 1368-69. Tesoro then attempted to assert the attorney-client and work product privileges to prevent having to disclose this information to stockholders bringing a derivative action against the company. *Id.*

The D.C. Circuit first addressed the attorney-client privilege and provided "[a]ny voluntary disclosure by the holder of such privilege is inconsistent with the confidential relationship and thus waives the privilege." *Id.* at 1369 (quoting *American Telephone & Telegraph*, 642 F.2d at 1299). The court also rejected Tesoro's assertion of a limited waiver of the attorney-client privilege:

> The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . . The attorney-client privilege is not designed for such tactical employment.

Id. at 1370 (quoting *Permian*, 665 F.2d at 1221). The court held that a limited waiver could not be employed against either a federal agency, as was the case in *Permian*, or a private party litigant, as was the case in *Subpoenas Duces Tecum*. *Id.*

The court next addressed waiver of the work-product rule and recognized generally that:

> [*T*]*he work product privilege* does not exist to protect a confidential relationship [like the attorney-client privilege], but rather *to promote the adversary system by safeguarding the fruits of an attorney's trial preparation from the discovery attempts of an opponent*. . . . A disclosure made in pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege."

Id. at 1371 (quoting *American Telephone & Telegraph*, 642 F.2d at 1299) (emphasis in original). However, the court provided: "[t]he doctrine of implied waiver allows courts to retain some discretion to ensure that specific assertions of privilege are reasonably consistent with the purposes for which a privilege was created." *Id.* (quoting *Sealed Case*, 676 F.2d at 817). Employing such discretion and the reasoning of *Sealed Case*, the court held that Tesoro had waived its work product privilege because it sought to employ the privilege in a manner inconsistent with its purpose, had no reasonable basis for believing that the disclosed information would be kept confidential

by the SEC, and such waiver did not impede on the inherent policy elements of the privilege. *Id.* at 1371-72. The court also rejected Tesoro's argument that the SEC had agreed to maintain Tesoro's attorney-client and work product privileges because the record did not provide any correspondence from the SEC to Tesoro to that effect. *Id.* at 1373-74.

Although the positions of the relative parties in *Subpoenas Duces Tecum* and the case *sub judice* are slightly different, the cases are analogous. Like Tesoro, MMC has disclosed its misdeeds to the government in return for leniency. Whereas Tesoro attempted to claim privilege against the shareholders to avoid becoming the defendant in a derivative action, MMC now attempts to claim privilege to escape being implicated by criminal defendant Pollard. Finally, like Tesoro, MMC claims that the government agreed to preserve MMC's attorney-client and work product privileges but does not have a government letter confirming this. Yet, the case *sub judice* differs from *Subpoenas Duces Tecum* in that it is a criminal trial; thus, preservation of the criminal defendant's rights alone may mandate discovery of the disputed material.

MMC argues that its letters to the government and the affidavit of its counsel prove that it took "affirmative action to preserve confidentiality." *See In re Horowitz*, 482 F.2d 72, 82 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). The Company cites *Teachers Insurance and Annuity Ass'n of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D. N.Y. 1981), to support its claim that a party does not waive its attorney-client or work product privileges if it provides a reservation of these privileges with production.

Finally, MMC argues that if its disclosure to the government constitutes a waiver of its attorney-client and work product privileges, such waiver is limited to the documents disclosed. The Company bases this argument

on the Second Circuit's decision in *Von Bulow v. Von Bulow*, 828 F.2d 94 (2d Cir. 1987), holding that publication by Claus Von Bulow's attorney of some of his communications with Von Bulow in his book describing Von Bulow's successful criminal defense did not constitute a complete waiver of all communications between Von Bulow and his counsel concerning the same subject matter. Applying the "fairness doctrine," the court provided: "[W]here, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed." *Id.* (Westlaw copy at 13). However, in this case, the disclosures were not made extrajudicially, and they may very well prejudice the party opposing the privilege; thus, *Von Bulow* is not on point.

MMC also argues that the waiver of the attorney-client and work product privileges must be limited to the documents disclosed because disclosure was made in the context of settlement. In support of this reasoning, MMC quoted the following language from *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974):

> This court is an agreement with the view that confidential information disclosed during settlement negotiations does not constitute a waiver of the entire attorney-client or work product privileges. It is a waiver limited to that information disclosed during the negotiations.

However, the court continued:

> Nevertheless, the court is not unmindful to the fact that privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case.

Id. (citing 8 Wigmore, Evidence § 2327 (McNaughton Rev. 1961)). Since MMC is potentially employing its

attorney-client and work product privileges as both a sword and shield, and since the rights of criminal defendant Pollard are of the utmost importance, it seems inappropriate to limit MMC's waiver of its privileges to the information it has disclosed to the government. As the Second Circuit recognized in *Von Bulow*:

> [I]t has been established law for a hundred years that when the client waives the privilege by testifying about what transpired between her and her attorney, she cannot thereafter insist that the mouth of the attorney be shut. *Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888). From that has grown the rule that testimony as to part of a privileged communication, in fairness, requires production of the remainder. McCormick on Evidence § 93, at 194-95 (2d ed. 1972).

Westlaw copy at 11.

In light of the foregoing discussion, and the overriding importance of the waiver issue, the documents in item 3 will be addressed first.

On September 17, 1986 and November 25, 1986, the Company submitted what it called a "Position Paper" to the government. By its own terms, that paper is "a written presentation discussing the factual and legal issues raised in the Baltimore federal grand jury investigation of the Company and its wholly-owned subsidiary, Maxim Group, Inc." It is obvious that the Position Paper is based not only on contemporaneously made records of events, but also on interviews conducted long after the events. For example, Mr. Westfall is quoted extensively from his January 31 and February 1, 1985 interviews. Moreover, the Paper contains assertions such as: "Of those consulted within the Company, all will testify that any qualms they had about the arrangement had nothing to do with worries about fraud." (September 17, 1986 at 29). In the November supplement, it is stated that

"there is no evidence, testimonial or documentary, that any Company officials in the meeting [of November 17, 1983], except Mr. Pollard and his Maxim employees, understood that Maxim had departed from the strict procedures of its IVI contract." (November 25, 1986 at 9).

A plea agreement was reached early in December, 1986, followed by an Administrative Settlement Agreement at the end of January, 1987. Both of these resulted in some public disclosure of the material involved here.

ITEM 3

There were two separate submissions in this category: a box containing "MMC-DLA communications and a small folder containing drafts of the Administrative Settlement Agreement and material involving Jay Brozost relevant to implementation of the Agreement. None of this material has been shown to be currently protected by either the attorney-client privilege or the work product doctrine, although some may not be relevant to the pending criminal charges.

With regard to published data—such as the Administrative Settlement Agreement—the information revealed to others, as well as details underlying the data, do not enjoy a privilege, *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984). The "details underlying the published data" include:

> "communications relating the data, the document, if any, to be published containing the data, all preliminary drafts of the document, and any attorney's notes containing material necessary to the preparation of the document."

748 F.2d at 875 n.7.

An *in camera* inspection of the documents in the box reveals the following:

1. All correspondence between MMC and DLA must be disclosed under the principle in *(Under Seal)*

as data meant to be published or underlying detail.

2. Smith's handwritten notes, except those which are indeciferable, also deal with public information. The Company has not attempted to identify any portion of these notes that may *not* relate to the published data as defined above.

3. Notes by Menaker and Johnson similarly appear to be directly related to the published data, containing interview notes and outlines of the Position Paper.

4. The Integrity Program Manual is not explained and does not appear to be protected.

5. The Drafts of the Agreement are not privileged.

6. The Brozost material was generated after the agreement was reached in compliance with its terms. While not privileged, it does not appear relevant, consisting of reports of other wrongdoings.

ITEM 2

Much of the interview material[2] may well have been protected by the attorney-client privilege when initially obtained. Some of it, however, has been disseminated. For example, the Westfall interview of January 31, 1985-February 1, 1985, is explicitly quoted in the Position Paper. The notes indexed here under Stanfield Johnson are copies of the same notes produced for item 3 labelled "Legal pads 6, 7, 8, and 9." Inasmuch as the Position Paper contains blanket references to all available evidence, interviews prior to the second submission on November 25, 1986, have lost their privileged character due

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[2] The tapes submitted along with the transcripts were spot checked for accuracy. No serious errors in substance were found. Pencil notations appear in the transcripts noting inaccuracies.

to voluntary disclosure. The only later materials are the Johnson notes mentioned above that are also in item 3 and some Smith notes in file 6 that are too cryptic to be readily understood.

ITEM 1

The Company asserts that the documents responsive to this request have, in large measure, been made available to defendant, albeit not in their presently organized fashion. Unless the defendant can demonstrate a need to have them produced again, the material will be returned to MMC. As stated above, however, the documents in folder 1 (documents dated after October 6, 1984) have not previously been disclosed and the Company does not assert a privilege as to them on the accompanying inventory. Folder 1, therefore, will be disclosed.

/s/ Joseph H. Young
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. A-417

MARTIN MARIETTA CORPORATION, PETITIONER

v.

WILLIAM C. POLLARD, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED, that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 12, 1989.

/s/ William H. Rehnquist
Chief Justice of the
United States

Dated this 25th day of November, 1988.

LAW OFFICES
MILES & STOCKBRIDGE
10 Light Street
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Telephone 301-727-6464

GEORGE BEALL

September 17, 1986

HAND DELIVERED

Honorable Breckinridge L. Willcox
United States Attorney
Elizabeth H. Trimble, Esquire
Assistant United States Attorney
United States Attorney's Office
for the District of Maryland
U.S. Courthouse, Eighth Floor
101 West Lombard Street
Baltimore, Maryland 21201

Dear Mr. Willcox and Ms. Trimble:

On behalf of our client Martin Marietta Corporation, we herewith respectfully submit two copies of the position paper which you invited us to tender at our meeting on July 24, 1986.

This submission is made on the express understanding that the government, from the fact of submission, will make no argument that either the company or any of the individuals involved in this matter has waived any legal privilege which may obtain. We further expressly understand that the government will not use information contained in this submission against our client or any of the involved individuals. However, we fully acknowledge that the government may pursue any and all leads which it may glean from this document.

In writing this paper, we attempted to address what we understand to be the government's concerns arising from the grand jury investigation of Maxim Group, Inc. If we have failed to address any, or if you have further questions about what we have said, we would be grateful for the opportunity to provide additional amplification.

We understand from our earlier meeting that you will be available for a continuing dialogue on this matter if and before any final resolution adverse to our client is to be reached.

With thanks for your consideration of these matters, we are,

Sincerely,

/s/ George Beall
GEORGE BEALL

/s/ Richard L. Beizer
RICHARD L. BEIZER
Counsel to Martin Marietta Corporation

Supreme Court, U.S.
FILED
MAR 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1157

IN THE
Supreme Court of the United States
October Term, 1988

MARTIN MARIETTA CORPORATION,

Petitioner,

v.

WILLIAM C. POLLARD,

Respondent.

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court extend the rule of *Upjohn Company v. United States,* 449 U.S. 383 (1981), for a special class of corporate defense contractors who secure lenient treatment for themselves by offering up a former employee to the Government as a "bad apple" responsible for alleged past transgressions of defense procurement regulations, by permitting such corporations, not only to assert the attorney-client privilege and the work product protection for discussions between attorneys and any employees of the firm regardless of their management authority, but thereafter to selectively disclose to the Prosecution, the Department of Defense and the Grand Jury, privileged and protected materials deemed favorable to the corporation's position, while maintaining the privilege and protection as a basis to deny the indicted former employee factual materials on the same subject matter which are material to his defense?

2. Where a defendant in a criminal case establishes that materials sought by a subpoena from a third party corporation are relevant, admissible, and specifically designated, can that third party corporation's claim of work product protection constitute grounds for failure to enforce the subpoena consistent with the defendant's Sixth Amendment right to compulsory process, after that corporation pleads guilty to charges stemming from the investigation which gave rise to the preparation of the materials at issue?

3. Does the limited protection afforded work product materials rise to the dignity of an evidentiary privilege recognized by the common law, the Constitution, statute, or court rule, within the meaning of Fed. R. Evid. 501, so as to deny a defendant in a criminal case access to specifically designated, relevant and admissible documents which are material to his defense at trial?

4. In applying the work product doctrine within its

own terms, what, if anything, more should be required to establish good cause for enforcing a subpoena for materials arguably covered by the work product doctrine beyond a showing that the subpoena meets the requirements of Fed. R. Crim. P. 17(c)?

5. Does the work product doctrine apply where the activities of counsel are material issues in a criminal trial, both to the Government's theory of conspiracy and fraud and to the defendant's proof that he was falsely offered up as a scapegoat by his former employer in an effort to secure lenient treatment for itself and to avoid implicating high level company officials?

PARTIES TO THE PROCEEDINGS BELOW

This case arises from a contempt citation in connection with a criminal case, *United States v. Pollard*, Crim. No. Y-87-0142 (D.Md. [Pending Trial]). Martin Marietta Corporation was held in contempt for failing to produce materials subpoenaed by the defense after being ordered by the District Court to do so. William C. Pollard is the defendant in the underlying criminal case and the party seeking enforcement of the subpoena. The United States was a party to the proceedings below, but did not file a brief.[1]/

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[1]/ The Government sought an order from the Court of Appeals giving it permission to disclose to Pollard the contents of a position paper submitted to it by Martin Marietta. The Court of Appeals declined to render what it considered to be an advisory opinion. (Pet. App. 15a n. 3).

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MARTIN MARIETTA CORPORATION,

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WILLIAM C. POLLARD,

Respondent.

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent, William C. Pollard, files this memorandum in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to apprise this Court of matters material to its determination of whether to commit its limited resources to this case.

OPINIONS BELOW

Respondent has no objection to the recitation of the Opinions Below contained in the Petition.

JURISDICTION

Respondent has no objection to the Statement of Jurisdiction contained in the Petition.

STATEMENT OF THE CASE

Petitioner's Statement of the Case omits facts which are critical to the evaluation of the decision below. Respondent's Cross-Petition for a Writ of Certiorari, filed in Case Number 88-1338, explains the general background of the underlying criminal proceeding against the respondent and the contempt citation that was issued against Petitioner. Here, respondent will focus on the most critical omissions from the Petition --(1) the nature of the knowing disclosures by Petitioner to the Government and the Grand Jury and the resulting agreement to give Martin Marietta lenient treatment; and (2) the relationship between the alleged internal investigation by Martin Marietta and the transactions at issue in the underlying criminal case.

Martin Marietta Waived Confidentiality

The Petition describes a situation where an attorney decides to "refer to his client's statements, and the conclusions of his own investigative activities as to the existence or absence of evidence to support his opponent's theories" (Petition at 2) and "counsel's report of verbatim statements by one Company employee . . ." (Petition 3-4).

The first point in need of clarification is that on at least one occasion we know that the disclosure went beyond mere argumentation of counsel. At that time, Martin Marietta disclosed not merely a synopsis of what a witness might say -- it took a statement made by one of its employees who will be a key witness against Respondent, as to which it asserts attorney-client privilege and work product protection, and it disclosed (1) the exact words the witness said; (2) the identity of the witness; and (3) the circumstances surrounding the statement including the questions to which he was responding. (Cross Pet. App. 61a-62a).

The second point in need of clarification is that, while the record suggests that there were other disclosures to the Government, it fails to illuminate what the extent of these other disclosures was. The District Court's memorandum opinion refers to the transcript of the January 31, 1985 interview with Company employee and witness Westfall as an "example" of the disclosures made to the Government of verbatim statements. (Pet. App. 32a). The memorandum was based upon an *in camera* review of the documents at issue which were neither included in the record nor made available to Pollard's counsel.

The record concerning the extent of disclosures made to the Government, other than the observations made by the trial judge after his *in camera* review, consists of representations by Martin Marietta which are hardly consistent, even as to the number of times that the Company disclosed allegedly privileged materials. In the proceedings below, Martin Marietta initially took the position that there was only one paper submitted to the office of the United States Attorney for the District of Maryland ("U.S. Attorney") which referred to lawyer-client communications. (Cross Pet. App. 50a). Sometime later, Martin Marietta revealed to the District Court that a further disclosure had been made to the Department of Defense ("DoD"), but the Company denied that either disclosure to the DoD or the U.S. Attorney revealed actual statements by any witness. (Cross Pet. App. 51a-54a). The Petition for a Writ of Certiorari shows yet another disclosure made in the form of a supplement to the initial paper submitted to the U.S. Attorney in November 1986. (Petition at 4).

The third point to be made concerning the extent of disclosures by Martin Marietta of allegedly privileged matter is that the Company made available to the Government, to testify against Pollard before the Grand Jury, witnesses who participated in the alleged internal investigation conducted by its legal staff upon which is based the privilege claims. These witnesses testified about confidential information furnished to

them by Martin Marietta employees in the very investigation which is in question. (Cross Petition at 8-9 n. 4, 11-12 n. 5). The Grand Jury transcript was not made part of the record below, although it was proffered to the Trial Court which was made aware that Pollard was relying upon it as a further basis of waiver.[2]

Finally, Pollard must take issue with Martin Marietta's characterization of these disclosures as part of the unsuccessful effort of its counsel to "persuade the United States Attorney not to bring criminal charges." (Petition at 3-4). While it is certainly true that Martin Marietta ultimately agreed to plead guilty to a three-count felony information (Petition at 4), the Petition omits the agreement which was reached with DoD whereby Martin Marietta was permitted to continue to do business as a Government contractor. The agreement with the U.S. Attorney was contemplated by the earlier agreement with the DoD, and it was executed only after the DoD agreement was reached. In contrast to the nominal fine that Martin Marietta paid in connection with its guilty plea in the criminal proceeding, it agreed to pay $4.3 million as part of the so-called "Administrative Settlement" with DoD for what Pollard contends was basically blackmail. A further provision of that agreement required Martin Marietta to discontinue the funding of Pollard's defense, although it was permitted to continue the funding of separate counsel for any other Martin Marietta employees that might come under investigation and to keep them on the Company payroll. (Cross Pet. App. 58a-60a).

From Pollard's viewpoint, all of the disclosures made to the Government were the result of a knowing and informed

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[2] Transcript of Motion Hearing, November 13, 1987 at 14-15. As Pollard's counsel observed, the grand jury transcripts were available to the Trial Court, since they were taken in the same District. If this Court grants certiorari, Pollard will seek to maintain the confidentiality of the grand jury transcripts under Fed. R. Crim. P. 6 by filing them for *in camera* review.

business decision by Martin Marietta, made with the advice and recommendation of its counsel, to offer up Pollard to the DoD and the U.S. Attorney as a scapegoat for the following purposes: (1) to enable Martin Marietta to continue doing business with the Government and thereby assure its very survival; and (2) to shift the Government's attention away from higher level corporate officials by offering Pollard as the sole culprit around whom the Company could define a damage control area.

The Transactions At Issue Include the Alleged Investigation

The Petition gives the reader the impression that the documents at issue were created as part of a legal investigation which was distinct from the transactions underlying the criminal case against Pollard. (Petition at 2-3). Thus, the Petition states that beginning in October, 1984, "Martin Marietta's General Counsel" was attempting "to learn the facts necessary to provide legal advice to Martin Marietta's senior management and to prepare for litigation." (Ibid).

The petition does not say much about the transactions at issue in the underlying criminal case, other than to allude that they are somehow the nefarious doings of Mr. Pollard. As shown in the Cross-Petition, the transactions at issue concern a travel project which enabled Martin Marietta to save on travel costs implemented through a so-called "Four Box Model" created by the office of the same Martin Marietta General Counsel who allegedly initiated the legal investigation. (Cross-Petition 4-7). Although the Petition implies that Martin Marietta's General Counsel first became personally involved by initiating a legal investigation in October of 1984 (Petition at 2), his personal involvement actually goes back at least to the preceding Spring when he allegedly attempted to throw newspaper columnist Jack Anderson off the scent of an investigative report of alleged wrongdoing in connection with the travel project and the Four Box Model. (Cross-Petition at 7).

The underlying charge now pending against Pollard is essentially that he indirectly defrauded DoD by obstructing an internal audit of Martin Marietta and its travel subsidiary. As the Court of Appeals explained, Pollard never had direct contact with DoD. (Pet. App. 5a). But while the audit is part and parcel of the transactions at issue in the underlying case, in the proceedings below Martin Marietta asserted that it was part of the legal investigation which formed the basis of its claim for asserting attorney-client privilege and work product protection. (Cross Pet. App. 56a-57a). Although Martin Marietta attempted to argue that the auditors were working for the legal investigation after October 8, 1984 (Ibid), they testified before the Grand Jury about information they learned well after that date in the course of their investigation. (See Cross Petition at 11-12 n. 5). While Martin Marietta attempts to draw a line after October 8, 1984, the indictment alleges a conspiracy enduring at least until the time that Pollard left Martin Marietta in November of 1984. (Cross Pet. App. 38a).

REASONS FOR DENYING THE WRIT

The members of this Court are far better equipped than Pollard to weigh the relative importance of this case against the many other pending appeals and petitions for certiorari which call upon its limited resources. But in order for this Court to make an informed decision, the Court must be apprised that the case is much more complex than appears from the face of the Petition.

Although the case below was resolved to the satisfaction of the District Court and the Court of Appeals on the basis of the waiver doctrine, this is only but one of many hurdles that Martin Marietta must overcome to establish its claim that the materials at issue should not be released to respondent Pollard for use in his defense of the criminal charges against him because they are allegedly covered by the attorney-client privilege and the limited protection of work product materials. Part I, below, explains that the ultimate issue of what should

be privileged is in the first instance a factual question unique to the circumstances of this case. Beyond this, for the Court to even consider Martin Marietta's claim that some of the materials at issue are covered by the limited protection afforded work product materials, it must determine whether the work product doctrine should be applied as an evidentiary privilege so as to deny a defendant in a criminal case access to documents which are material to his defense. Issues 2 through 5 in the Questions Presented for Review in this Memorandum are identical to the Questions presented in the Pollard's Cross-Petition.

Part II, below, examines the questions presented for review by Martin Marietta's Petition. Contrary to Petitioner's protestations, the Courts below applied the longstanding principle that the holder of an evidentiary privilege cannot selectively reveal information covered by the privilege where it is deemed beneficial to himself, and then claim the benefit of the privilege to withhold other information on the same subject matter. As the Petition itself alludes, a narrow reading of the waiver doctrine tends to broaden the scope on an evidentiary privilege. (Petition at 16). What is really at issue is that, after securing the broadest application of privilege in *Upjohn Company v. United States,* 449 U.S. 383 (1981), by extending the attorney-client privilege to communications between counsel and all corporate employees regardless of their management responsibility, Martin Marietta wants to be relieved of the corresponding responsibility to keep the privileged information confidential. For this Court to endorse any such effort would allow corporate privilege holders, such as Martin Marietta, to falsely accuse former employees of sole responsibility for past transgressions as a means of relieving current officials from responsibility without revealing the basis for the accusations that they make. See STRASSER, CORPORATE PROBE USE EXPANDING, The National Law Journal, January 9, 1989, p. 1. Nothing in *Upjohn* suggests such an unfair result, and the Court need not burden itself by considering Martin Marietta's proposal further.

I. Martin Marietta Has Failed to Build A Factual Record to Support Its Claim of Limited Waiver or Even To Show that the Documents at Issue Are Protected From Disclosure in the First Instance.

In order for this Court to resolve the extent of any evidentiary privilege claimed by Martin Marietta, it will be necessary to draw at least three important distinctions which are very difficult to make on the current state of the record. The first, and most obvious from the Petition, is the distinction that Martin Marietta must have the Court draw between matters which were disclosed to the U.S. Attorney, the DoD, or the Grand Jury, and matters which allegedly remained confidential. Unfortunately, the record is extremely murky on this, largely as a result of the inconsistency in the positions the Company took in the proceedings below on even as to how many times the Company revealed witness statements to the Government.

Two more factual distinctions must be made in order to determine what was and what was not privileged in the first place. According to Martin Marietta, the documents at issue are covered by the attorney-client privilege and the limited work product protection because they were created as part of a legal investigation. Most companies in Martin Marietta's position would have entrusted such an investigation to outside counsel at the outset, if for no other reason than to draw a clear line of demarcation between the investigation itself and any activities that may have preceded it. But in a situation where the crime charged is essentially that of misleading company auditors, Martin Marietta utilized the same auditors in its so-called legal investigation, and entrusted the investigation to the same General Counsel who supervised the lawyers who created the transactions at issue, and who earlier had been personally involved in an effort to throw an investigative reporter off the trail, which some might regard as a cover-up.

(See Cross Petition at 7-8). [3] As a result of these decisions, and the lack of any effort on Martin Marrietta's part to demarcate the starting point of its alleged legal investigation [4], it is now extremely difficult to distinguish the fruits of a legal investigation which are arguably protected, from nonprivileged accounting functions conducted in the ordinary course of business. It is likewise difficult to distinguish the investigation allegedly conducted for the purpose of representation and advice to the corporation, from the activities of the General Counsel's office in setting up the transactions at issue in the underlying case and later allegedly covering up those transactions. [5]

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[3] Although outside counsel were subsequently retained, Martin Marietta's General Counsel, Frank H. Menaker, Jr., apparently continues to supervise their efforts to this day. For example, he continues to appear "of counsel" on Martin Marietta's filings in this Court.

[4] Thus, Vice President of Auditing David Clous' Grand Jury testimony was to the effect that he was directing the investigation even after he was drafted by Menaker's legal investigative team (Cross Petition at 8-9 n. 4), while his affidavit asserts that Menaker directed it. (Cross Pet. App. 56a-57a).

[5] According to the indictment, the conspiracy to defraud the United States continued through November of 1984, well after the alleged legal investigation began. Although the indictment does not identify acts of counsel among the overt acts alleged in the indictment, a press release by the U.S. Attorney and the Statement of Facts submitted to the Court in support of Martin Marietta's guilty plea asserts that members of senior management had reason to question what was going on or failed to supervise what was going on. According to the U.S. Attorney's press release and Statement of Facts, three Martin Marietta vice-presidents attended a meeting in October of 1984 where allegedly incomplete information was given to the Government. (App. 4a, 7a). Since Pollard did not attend that meeting, at least one avenue of defense that needs to be explored is the ultimate

(continued...)

In addition to these factual questions, ultimately it will be necessary to resolve the question of whether the limited protection for work product materials should be afforded the status of a full evidentiary privilege, so as to deny a defendant in a criminal case access to documents shown to be specifically designated, relevant and admissible under the criteria of Fed. R. Crim. P. 17(c). It was not necessary for the District Court to deal with this matter because it determined that privilege and protection had been waived as to all of the documents involved. Because the Court of Appeals ruled that some of the materials should be protected from disclosure on the basis of work product protection, these questions are the subject of Pollard's Cross-Petition filed in Case No. 88-1338. The Cross Petition shows that the Court of Appeals extended the work product doctrine in violation of the Sixth Amendment and Fed. R. Evid. 501. Although Pollard sees no need to repeat here everything in the Cross Petition, the Court should understand that the issue will need to be addressed if certiorari is granted.

II. Martin Marietta Has Advanced No Justification to Extend *Upjohn*.

Martin Marietta primarily argues that the rulings below conflict with *Upjohn*, in that this Court determined to give the attorney-client privilege a broad sweep. As Martin Marietta acknowledges (Petition at 15, n. 10), the *Upjohn* Court did not directly address the issues of waiver and scope of waiver. The issue in *Upjohn* was whether the communications between lower level employees and corporate attorneys were privileged in the first instance. The Court rejected the control group test

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[5](...continued)
source of those misrepresentations. According to the Statement of Facts, Martin-Marietta vice-presidents were advised by counsel of the nature of the Four Box Model and were told of the profit potential for Maxim which the Government considers extraordinary. (App. 3a, 7a).

adopted by some lower federal courts, on the grounds that it tended to discourage "the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." 449 U.S. at 392. While *Upjohn* defined the zone of privacy afforded attorney-client communications to include lower level employees of a corporate client, it nonetheless did so only with respect to persons acting in the course of a confidential relationship with the client.

Martin Marietta urges in its petition that *Upjohn* did not go far enough. Thus, it asserts the need for special protection in order to engage in "frank discussions with opposing counsel in an attempt to settle cases." (Petition at 7). Such considerations have very little to do with the privacy of communication between lawyer and client. What Martin Marietta is attempting to do here is to extend the zone of privacy to those having an adversary interest to the client, by allowing the client to selectively disclose to its adversaries those portions of confidential communications deemed favorable to its own position while secreting the remainder. Thus, Martin Marietta criticizes Upjohn's treatment of the waiver issue on the basis of a commentary. (Petition at 15 n. 10). That commentary sets forth the issue more candidly than does Martin Marietta, as the creation of a new evidentiary privilege for "self-critical analysis." CRISMAN & MATHEWS, LIMITED WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE IN INTERNAL CORPORATE INVESTIGATIONS: AN EMERGING CORPORATE "SELF-EVALUATIVE" PRIVILEGE, 21 Am. Crim. L. Rev. 123, 171-72 (1983).

The voluntary disclosure of a communication, otherwise subject to a claim of privilege, effectively waives the privilege. *In re Penn Central Commercial Paper Litigation*, 61 F.R.D. 45 (S.D.N.Y. 1973); *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); C. MCCORMICK, EVIDENCE §§ 93, 97 (1954). The privilege of secret communication between lawyer and client has resulted from a

time tested balancing of the value of confidentiality against the hindrance to the search for truth which it necessarily implies; the privilege is intended only as an incidental means of defense, and not as an independent means of attack. WIGMORE, TREATISE ON THE LAW OF EVIDENCE § 2327. Thus, to allow corporations to utilize allegedly privileged materials [6] to point a finger of blame at an individual, and then to retain their claim of privilege as to information they choose not to reveal, tends to upset the traditional balance.

Crisman & Mathews's analysis demonstrates that there is very little new in the approach taken below to the waiver issue. Thus, they characterize the "strict" application of waiver principles as the "traditional approach". *Crisman & Mathews, supra,* 21 Am. Crim. L. Rev. at 127. Faced with the rise in corporate accountability over the last several years, principally in the burgeoning Securities and Exchange Commission Enforcement Program, they state that a minority of lower courts have adopted a limited waiver theory for self-investigations in order to alleviate the harsh effect of strictly applying of the waiver doctrine in cases of disclosures compelled in a regulatory environment, and also to encourage corporate self-evaluation. *Crisman & Mathews, supra,* 21 Am. Crim. L. Rev. at 126, 131-33. These commentators state that "altering the traditional privileges and strict waiver principles may be the wrong approach." *Crisman & Mathews, supra,* 21 Am Crim. L. Rev. at 127. They urge consideration by Congress of legislation to carefully tailor a distinct privilege for corporate self-evaluations in the place of stretching traditional attorney-client and work product privileges far beyond their

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[6] As shown in the Statement of the Case, the record suggests that Martin Marietta's disclosures and testimony to the U.S. Attorney, the DoD, and the Grand Jury went well beyond argument of counsel or even a discussion of the conclusions drawn by an investigation. In at least one instance, verbatim statements were revealed as to which Martin Marietta continues to assert privilege.

traditional rationale. Ibid. [7]

Whatever the merits of the *Crisman & Mathews* proposal, or the minority view extending the traditional attorney-client privilege and work-product doctrine through a limited waiver principle, this case presents a poor vehicle for their consideration by this Court. Contrary to Martin Marietta's protestations (Petition at 13-14), Pollard is not some third party who seeks to profit from the fact that disclosures of privileged materials were made to a Government agency. Pollard was the target of an intentional effort by Martin Marietta to minimize the impact of the Government's charges against itself by assigning sole responsibility for the transactions at issue to Pollard. The Government's case against Pollard was put together by Martin Marietta and is largely based upon allegedly privileged and protected information that Martin Marietta gleaned and supplied. It is nothing but sophistry for Martin Marietta now to argue that no testimonial use of the disclosures was made against Pollard. (Ibid). But for Martin Marietta's disclosures, it is highly unlikely that the Government would have indicted Pollard. The prosecution is now armed with statements by witnesses that have effectively locked in their testimony before the Grand Jury and will likely strongly influence the testimony that the witnesses will give at trial against Pollard. Considerations of fairness require application of the waiver doctrine regardless of whether a client uses a privileged statement in testimony directly against an adversary or whether he makes the statement available to someone else to use.

Martin-Marietta's policy arguments concerning furtherance

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[7] The *Crisman & Mathews* proposal would afford a limited "self-evaluative" privilege for materials gathered in a corporate internal investigation, regardless of whether the inquiry was conducted by attorneys, accountants, investigators or other inside or outside agents or consultants. Although a Government agency itself would be allowed to make free use of materials disclosed to it, the materials would be protected from disclosure to competitors and other adversaries of the corporation. 21 Am. Crim. L. Rev. at 175-76.

of settlement discussions (Petition at 12-13 & n. 6) are also misplaced in this case. Although the Rules afford some protection for plea bargaining between a defendant and the prosecution, the expectation of confidentiality terminates once the defendant enters a plea of guilty, as Martin Marietta did in this case. Fed. R. Crim. P. 11(e)(6).

If the Court wishes to consider the adoption of either the *Crisman & Mathews* proposal or the minority rule on limited waiver, there will be many corporate litigants [8]/ who will offer much more compelling arguments than Martin Marietta will be able to make on this record. The Securities and Exchange Commission is not likely to abate its enforcement program any time soon. Unlike Martin Marietta, there are sure to be many corporate litigants who will be in a position to argue that disclosures made to that agency were not intended to implicate others. Martin Marietta's disclosures to the U.S. Attorney, the DoD and the Grand Jury were not the result of any regulatory requirement unique to corporations. These disclosures were simply the efforts of a target in a criminal case to secure

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[8]/ Martin Marietta's suggestion that the issue may escape meaningful review if the Court does not grant certiorari in this particular case (Petition at 22-24) is absurd. Full application of the waiver principle is the established traditional rule. Martin Marietta waived its privilege on the basis of advice of counsel who were well aware at the time that in the Fourth Circuit, at least, there is no limited waiver of privilege. *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984). Martin Marietta made a decision to waive privilege based upon sound business reasons, and given the choice of cooperation with the Government or facing debarment proceedings would likely make the same choice again. Future litigants are free to follow Martin Marietta's path if they have the courage of their convictions. While it is certainly true that the expense of litigation would need to be weighed against the likelihood of success (Petition at 24), the argument that reasonable corporate executives in the future having the financial resources to litigate would choose not to do so can only demonstrate (1) the underlying lack of merit in Martin Marietta's position; or (2) the lack of substantial prejudice from the viewpoint of corporate executives required to operate within the rule applied by the courts below.

lenient treatment for itself by implicating someone else so that it could continue doing business with the Government.

If the Court adopts Martin Marietta's proposal on the facts of this case, there would be no logical basis to limit the rule to publicly traded companies regulated by a Government agency, and it will be extremely difficult to limit its application in cases where other elements of organized crime, drug dealers or terrorists adopt the corporate form. On the other hand, if the Court were to rule against Martin Marietta's position it would likely limit its holding to the facts presented, which will only necessitate revisiting the issue again on a more compelling case brought by a corporate entity who makes disclosures to a Government agency which are not at the expense of the party seeking further disclosure.

CONCLUSION

Martin Marietta's Petition for a Writ of Certiorari should be denied. If the Court determines to grant that Petition, it should grant Pollard's Cross Petition filed in Case No 88-1338 to fully and fairly consider the issues presented by the case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :
v. : Crim. No. Y-87-053
MARTIN MARIETTA CORPORATION:

STATEMENT OF FACTS

Martin Marietta Corporation ("MMC") is a publicly-held company having its headquarters at 6801 Rockledge Drive, Bethesda, Maryland. MMC is engaged in the business of the development, manufacture and sale of systems and products in the aerospace and defense fields to the Department of Defense, as well as to various other branches of the federal government.

In 1982, MMC organized a committee to study how company travel could best be managed in view of the large yearly volume of travel by MMC employees. The committee decided to contract with a travel agency which could handle travel arrangements for the various MMC divisions. In response to MMC's request for proposal, various agencies offered to perform the travel function; several of the proposals promised to rebate to MMC a substantial portion of the commissions attributable to the company's business which the agency wold receive from airlines, rental car companies, and hotels.

MMC chose IVI Travel, Inc., a company based outside Chicago, to manage their travel. The selection of IVI was based on its ability to provide the services needed by MMC and on its offer to provide MMC a cash rebate.

Under the applicable Department of Defense regulations,

a contractor must credit to the government, either as a cost reduction or by cash refund, the applicable portion of any rebate relating to an allowable cost which it receives. Thus, if an MMC employee's travel was charged to a government contract and MMC received a rebate attributable to that travel, the government would be entitled to a credit or refund in the amount of the rebate.

MMC decided to devise an arrangement whereby it could keep the money proffered by IVI attributable to government travel instead of passing it through to the government. In the fall of 1982, various MMC employees proposed a plan which they called the "four box model." Under this plan MMC and IVI would each set up a subsidiary company. Performance Travel, Inc., the IVI subsidiary, would provided travel services to MMC. It would recover its costs from the commission fees paid by the airlines, rental car companies, and hotels. Maxim, the MMC subsidiary, would provide consulting services to IVI Travel. IVI would keep as a management fee 1% of gross travel revenues booked by PTI for MMC; the remaining commissions less the PTI operating costs would be available to Maxim. The MMC plan was that bona fide services had to be performed by Maxim before it could receive money from IVI. All profit realized by Maxim would go to MMC.

MMC and IVI established their respective subsidiaries in December, 1982. Thereafter, MMC employees prepared two contracts, one between MMC and PTI for travel services, and the other between Maxim and IVI for consulting services. Omitted from these contracts was the understanding that IVI would, after taking its management fee, make all of PTI's profits available to Maxim. Moreover, neither contract referenced the other nor gave any indication of a relationship between the money IVI would use to purchase services from Maxim and the commissions received by PTI on travel arrangements purchased by MMC. The two contracts, each for a one-year term, were executed on January 25, 1983.

During 1983, the volume of MMC travel handled through PTI/IVI increased as PTI opened offices at the various MMC locations. Monies were paid by IVI to Maxim for services performed in connection with setting up the PTI offices which provided travel assistance to MMC, and as reimbursement for Maxim employees working for PTI on MMC travel.

In October, 1983, Maxim employees, mindful of a status review meeting with several MMC vice presidents which was scheduled for November, solicited a $100,000 payment from IVI; those monies were available from the accumulated profits of PTI. The $100,000 served to improve the appearance of Maxim's books, and ultimately permitted it to show a $12,000 profit for 1983.

At the meeting in November, Maxim staff, including its president and general manager, presented to four MMC vice presidents the results of their 1983 operations and their projections for 1984. The projected profits of $1.1 million on revenues of $1.69 million. No question was raised at this meeting as to how Maxim was able to project $1.1 million in profits based on revenues of $1.69 million.

On January 27, 1984, he original contracts were renewed for another on-year term. The renewed MMC/PTI contract was executed by a vice president of MMC, and the renewed Maxim/IVI contract was signed by the president of Maxim.

In connection with a formal meeting for the Board of Directors of MMC in early 1984, a question was raised about Maxim Group, Inc. As a result of this inquiry, an internal memorandum was prepared and circulated to an MMC vice president which described the Maxim-IVI/MMC-PTI relationship as "very imaginative in getting around the rebate restrictions" and said "DCAA might dislike it."

IN April, 1984, Maxim proposed and IVI agreed to change the reimbursement rate for Maxim employees on loan to PTI from three times their salaries to five times their salaries. This was necessary to keep the monthly amount attributable to this function paid by IVI to Maxim at about $20,000 since the number of loaned employees has dropped.

Due to an expanding volume of travel by MMC which was booked through PTI, PTI's profits increased substantially in 1984. Maxim demanded and received from IVI increasingly larger amounts of money attributable to MMC travel without regard to the provision of services. Under applicable government regulations, these funds constituted rebates on travel billed in large part to the government.

MMC did not account to DOD for these rebates until late in 1984. Instead, during the summer of 1984, Maxim employees prepared false documents in an attempt to show that these monies had been earned by Maxim. On July 23, 1984, and again on August 29, 1984, the mails were used to transmit the documents which were designed to make it appear that Maxim had earned money from IVI by performing services, when in fact no services had been performed.

In October 1984, a report in the press, based on the internal MMC memorandum, revealed the Maxim-IVI/MMC-PTI relationship. Based on this and other information, representatives of the Defense Contract Audit Agency met with various MMC officials. DCAA sought access to MMC records in order to determine whether any credits or payments were due to the government as a result of this arrangement. At a meeting held on October 18, 1984 and attended by three MMC vice presidents, DCAA was provided with information regarding the performance of Maxim which DCAA later came to believe was incomplete.

Following the conclusion of the company's internal

investigation, it credited all Maxim net revenues for 1984 to its overhead pools, thus reducing costs charged to the government. This actions was accomplished prior to submission to he government of the company's overhead claim for 1984.

The overhead claim for 1983 was submitted to the Department of Defense on May 21, 1984. That claim was false in that it failed to account for rebate monies received as a result of travel attributable to government contracts.

/s
Breckinridge L. Willcox
United States Attorney

/s
Elizabeth H. Trimble
Assistant United States Attorney

Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, FEBRUARY 17, 1987

Breckinridge L. Willcox, U.S. Attorney for the District of Maryland, announced today that Martin Marietta Corporation had entered guilty pleas to two counts of mail fraud and one count of making a false statement to the United States Defense Department. The please [sic] were entered to charges contained in an Information filed before Federal District Judge Joseph Young today.

Martin Marietta Corporation, which has its corporate headquarters in Bethesda, Maryland, is one of the nation's largest defense contractors.

"This case represents another example of the Department of Justice efforts in the area of Defense procurement fraud. The Attorney General has made defense procurement its highest priority in while collar criminal prosecutions", said Victoria Toensing, Deputy Assistant Attorney General, Criminal Division.

The case was screened by the Defense Procurement Unit of the Fraud Section.

Mr. Willcox stated that the mail fraud scheme to which the company plead guilty arose out of an effort by the company to establish a relationship with a travel agency that would allow Martin Marietta to retain rebates from government-sponsored travel, rather than credit such commissions back to the government as required by applicable Department of Defense regulations.

According to the Government's Statement of Facts filed with the Information, Martin Marietta and a Chicago-based

travel agency, IVI Travel, Inc., entered into a complicated arrangement with subsidiary companies that allowed Martin Marietta to retain travel rebates offered by IVI. An internal memorandum delivered to a Martin Marietta Vice-President described the travel agency arrangement as "very imaginative in getting around the rebate restrictions." It was the position of Martin Marietta that these monies were initially intended to be earned by the newly-established Martin Marietta subsidiary by preforming services for the travel agency. By its guilty pleas, the company admitted that for a period of time, from October, 1983 until October 1984, Martin Marietta received the money without regard to services performed by its subsidiary. By October, 1984, the amount of rebates credited to Martin Marietta exceeded $1.8 million. Approximately 75% of Martin Marietta's travel was incurred on government-sponsored contracts. Mr. Willcox stated that Martin Marietta has agreed to repay to the United States the sum of $4.3 million, which represents the entirety of the travel rebate commissions earned by the IVI subsidiary on Martin Marietta travel.

According to the Statement of Facts, employees of Martin Marietta's travel subsidiary carried out the scheme to defraud the United States by creating, in the Summer of 1984, false documents in an attempt to show that the rebate monies had been earned. Following public disclosure of the Martin Marietta travel arrangement, in October 1984, representatives of DCAA met with three Martin Marietta vice presidents. At this meeting Martin Marietta provided information to DCAA that was later deemed to be "incomplete," according to the Statement of Facts.

The false statement count covers Martin Marietta's claim to the Department of Defense for overhead expenses for 1983 which failed to credit the government for monies received through this scheme.

Under the terms of a plea bargain agreement, the United

States Attorney's Office will recommend that the maximum penalty of $1,000 on each mail fraud count and $10,000 on the false statement count be imposed on Martin Marietta. The company has agreed to pay the United States $250,000 as reimbursement for the costs of the criminal investigation.

Mr. Willcox said that a guilty plea by the company was particularly appropriate in this case. "The evidence in this case revealed that a series of high-level Martin Marietta executives had involvement in various portions of this scheme at different times. It is fully appropriate for a corporation to be held accountable for the activities of its employees, especially when senior management either had reason to question certain activities, or failed to supervise, or both."

The investigation was conducted by Special Agents of the Defense Criminal Investigative Service, and was presented to the Grand Jury by Assistant U.S. Attorney Elizabeth H. Trimble.

Breckinridge L. Willcox indicated that the investigation is continuing and stated "additional indictments are a distinct possibility."

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OCTOBER TERM, 1988

MARTIN MARIETTA CORPORATION,
Petitioner,

v.

WILLIAM C. POLLARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S REPLY TO THE MEMORANDUM IN OPPOSITION

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Respondent Pollard argues that "the case is much more complex than appears from the face of the Petition." Opp. at 6. To the contrary, the legal questions raised by the Petition are well and squarely presented on the existing record and by the decision of the court below.

1. While Pollard cites his theory that there were other waivers not discussed by the Court of Appeals, and argues his assertion that the underlying documents were not, in fact, privileged,[1] the Court of Appeals found a

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[1] Respondent's recitation of facts is replete with casual misstatements of fact for which no support can be given—or for which Respondent cites only his own prior unsupported assertions in the

waiver solely on the basis of the submission of the position papers to the United States Government. In so holding, it had no occasion to pass upon any other theory of waiver, or to determine whether the underlying documents were, in fact, covered by the attorney-client and work product privileges.

It was sufficient for the Court of Appeals that the submissions to the United States Government waived privileges associated with those documents; it was on that basis alone that they were ordered disclosed; and it is by that order that Martin Marietta is aggrieved. In connection with this petition, there is no need—indeed, in light of the limited scope of the judgment below, it would be improper—to consider any of Respondent's alternative theories why the documents ordered disclosed on the basis of a finding of implied waiver should now be ordered disclosed on the basis of factual findings that he is now asking this Court to make in the first instance.

Thus Respondent may be correct that "[a]lthough the case below was resolved to the satisfaction of the District Court and the Court of Appeals on the basis of the waiver doctrine, this is only but one of many hurdles that Martin Marietta must overcome to establish its claim that the materials at issue should not be released to respondent Pollard . . . ." Opp. at 6. But those additional "hurdles" for Martin Marietta are of no concern to the Court at this stage of the proceedings precisely because—as Pollard acknowledges—they had no role in the decisions of the courts below. Implied waiver was the sole basis for the Court of Appeals' determination that the documents in question must be produced to Pollard. This

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Cross-Petition or in some brief below. Those misstatements, however, bear no relation to the questions actually decided below and are thus irrelevant to this petition.

Court may assume, as did the Court of Appeals, that the documents involved are privileged.[2]

2. Respondent emphasizes that the position paper submitted to the United States Attorney included a quotation and disclosed:

> (1) the exact words the witness said; (2) the identity of the witness; and (3) the circumstances surrounding the statement including the question to which he was responding.

Opp. at 2. Beyond the fact that a company employee, speaking to the company's attorney, is not aptly characterized as a "witness," it bears emphasis that this case does *not* involve the question whether the position paper, including any "verbatim statements" (Opp. at 12 n.6) included in the paper, or anything else that was part of the position paper, is privileged. The issue presented by the petition is whether such a submission works a wholesale waiver with respect to *undisclosed* documents, as the Court of Appeals held.

It may be, as Pollard asserts, that a document voluntarily disclosed to some third party can no longer be regarded as privileged. Opp. at 11-12. *But see Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (privileges *not* waived either with respect to the submission to the Government or confidential communications on the same topic).[3] That principle does

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[2] The district court held that the documents were privileged, a conclusion not contested by Respondent in the Court of Appeals. Thus, at a minimum, there is a colorable basis for the privilege claims.

[3] A number of courts have held that disclosure of documents protected by the work product doctrine does not necessarily waive that privilege. *See, e.g., In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("[t]he purposes of the work product privilege are more complex, and they are not inconsistent with selective disclosure—even in some circumstances to an adversary").

not require the further conclusion that the fruits of an attorney's investigative efforts in preparation for litigation, reflected in documents that are *not* disclosed, but in some sense related to conclusory or partial disclosures made in the course of settlement discussions, are to be stripped of privilege. That question is the one presented here.

3. As his principal point, Pollard argues that he was "offered up" as a " 'bad apple' " by Martin Marietta and that this argument by Pollard should somehow affect the waiver issue. Pollard offers no legal theory why it should. The Court of Appeals assuredly did not rely on that theory as the basis for its finding of waiver.[4] In connection with waiver, the Court of Appeals rested exclusively upon the theory that Martin Marietta had made conclusory disclosures about its investigative efforts and quoted a client statement (thereby waiving the attorney-client privilege as to all related documents), Pet. App. 8a, and had made a "testimonial use" of privileged material by trying to induce an opposing party to settle (thereby waiving work product protection), Pet. App. 12a.

Pollard's theory and statements in this regard are not only irrelevant but untrue. He blithely asserts:

> The Government's case against Pollard was put together by Martin Marietta and is largely based upon allegedly privileged and protected information that Martin Marietta gleaned and supplied.

Opp. at 13. There is nothing in the record that even suggests that Martin Marietta "put together" the Government's case or that the Government relied on *any* "privileged and protected" materials in the preparation of its case against Pollard, or that the Government presented such materials to the grand jury, or that it would or

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[4] The Court of Appeals discussed Pollard's contention as part of its discussion of the relevance, admissibility and specificity requirements applicable to criminal subpoenas in general. Pet. App. 5a.

could use such materials against Pollard at trial. The Government did not have such materials, precisely because the materials that Pollard now seeks were not submitted to the Government. Not surprisingly, the Government (through the grand jury) subpoenaed thousands of Martin Marietta documents, which Martin Marietta "supplied" (Opp. at 13), and compelled the testimony of various Martin Marietta employees before the grand jury. But none of that material was privileged.

If Pollard wants any of the documents that the Government has, in fact, subpoenaed from Martin Marietta, and that the Government might therefore use against him, Pollard may seek that material directly *from the Government* in the course of the criminal proceedings. No issue about documents actually given to the Government, or testimony to the grand jury, is presented here; this case is about undisclosed, confidential documents in the possession of Martin Marietta. In fact, even if the Government had somehow obtained the confidential notes of the attorneys who conducted the investigation, those materials could not be used against Pollard in the criminal proceeding.[5] *See* Fed. R. Evid. 802; *Palmer v. Hoffman*, 318 U.S. 109, 113-15 (1943) (documents prepared in anticipation of litigation are not within the business record exception to the hearsay rule). Pollard has not, and could not suffer any legal prejudice from the submission of Martin Marietta's position paper to the Government—the only disclosure at issue here.

4. While offering no analytical or practical rationale to support the holding of the court below, Pollard nonetheless asserts that the law is clear. Opp. at 14 n.8. In asserting this conclusion, the Opposition Memorandum

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[5] In addition, the position paper was submitted on the express understanding "that the government will not use information contained in this submission against our client *or any of the involved individuals*." Pet. App. 35a.

simply ignores the starkly contrary approaches to the same issues taken, for example, by the Second Circuit in *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987) (extra-judicial disclosure does not waive privilege for undisclosed documents and communications) and the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (neither confidential information actually disclosed to government, nor related confidential information, is subject to discovery by third parties). As described in the Petition (at 11 n.4) and as set forth more fully in the briefs of Amici American Bar Association (at 2-3) and American Corporate Counsel Association (at 16-20), the absence of any guidance from this Court on the issue of waiver has produced "disarray" in the lower courts on an issue upon which a substantial measure of certainty is required.

Respondent does not contest the importance or currency of the question presented as it affects the day-to-day conduct of attorneys in both civil and criminal cases. The chilling effect of this decision and decisions like it on the investigative efforts of attorneys, on the one hand, and on the settlement of cases, on the other, makes this a case that will have a profound effect on the conduct of many cases, but the issue it raises will seldom present itself for review. The filing of briefs *amicus curiae* by the American Bar Association and the American Corporate Counsel Association in support of the petition highlights the significance of the issues raised here.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted

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MOTION OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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MOTION OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, amicus curiae American Corporate Counsel Association ("ACCA") requests leave to file the accompanying brief as amicus curiae in support of the petition for writ of certiorari. Counsel for petitioner has consented to the filing of this brief; however, counsel for respondent has declined consent.

ACCA is a national bar association devoted exclusively to the professional activities of attorneys on the legal staff of corporations and other business organizations in the private sector. With 33 local chapters across the country, ACCA has approximately 7,500 members em-

ployed in a legal capacity by some 3,000 organizations. Many of these members are the chief legal officers of their clients.

ACCA and its members have a substantial interest in and expertise regarding issues involving waiver of the attorney-client and work-product privileges. Decisions like the one at issue here substantially constrain the ways in which corporate counsel carry out their responsibilities. ACCA seeks to inform the Court of the importance of the issues raised by the petition, particularly as they affect corporate counsel, and the potential adverse consequences of leaving those issues unreviewed.

For the foregoing reasons, the motion of ACCA to file the accompanying brief as amicus curiae in support of the petition for a writ of certiorari should be granted.

Respectfully submitted.

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BRIEF FOR THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is described in the preceding motion for leave to file this brief.

STATEMENT

This case arises out of a discovery dispute in connection with the pending criminal prosecution of respondent William C. Pollard in the United States District Court for the District of Maryland. The government alleged that Pollard, in his capacity as president of Maxim

Group, Inc., the travel operations subsidiary of petitioner Martin Marietta Corporation, conspired to defraud the Department of Defense and committed mail fraud by operating a scheme to mischaracterize certain travel cost rebates. Pet. App. 2a.

Following his indictment, Pollard issued a subpoena under Fed. R. Crim. P. 17(c) for certain documents prepared by Martin Marietta and its counsel in the course of an internal investigation of Maxim's practices. Martin Marietta had quoted from some of these documents in a position paper that it submitted (along with a reservation of confidentiality) to the Department of Justice in an effort to persuade the Department not to indict the company for Maxim's activities. Pet App. 8a. In addition, during the course of settlement negotiations with the Department of Justice and the Department of Defense, Martin Marietta had made assertions about the strength of its case based in part upon facts and analyses contained in the subpoenaed documents.

Pollard claimed that submission of the position paper and partial disclosure of the results of the internal investigation during negotiations with the government waived Martin Marietta's attorney-client and work-product privileges as to previously undisclosed underlying documents relating to the same subject matter. Pet. App. 25a, 26a. The district court agreed and ordered production of the bulk of the subpoenaed documents. *Id.* at 32a-33a. When Martin Marietta refused to comply, the court held the company in civil contempt and imposed a fine of $1,000 per day. *Id.* at 18a.

The court of appeals affirmed in substantial part. The court implicitly acknowledged that the materials sought by Pollard's subpoena originally had been covered by the attorney-client and work-product privileges. It held, however, that these privileges had been waived when "otherwise privileged materials were disclosed to the

United States Attorney and the DOD." Pet. App. 6a. Moreover, in determining the scope of this waiver, the court rejected Martin Marietta's argument that the waiver should be limited "to the information that it acually disclosed to the government (copies of which Pollard has been provided) rather than implying a waiver as to all materials on the same subject as those provided the government." *Id.* at 7a. Instead, the Fourth Circuit concluded that "*any* disclosure of a confidential communication outside a privileged relationship will waive the privilege as to *all* information related to the same subject matter." *Ibid.* (emphasis added).

Thus, the court of appeals stated that "if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as ' "the details underlying the data which was to be published" ' will not enjoy the privilege." Pet. App. 7a-8a (citations omitted). Because "all the materials at issue in the present case are either information revealed to others or details underlying the data that was published," the court concluded that "they do not enjoy an attorney-client privilege from disclosure under a Rule 17(c) subpoena." *Id.* at 9a. Similarly, the court held that, in submitting the position paper and disclosing the results of the internal investigation during settlement negotiations, Martin Marietta made "testimonial use" of its work-product privilege in an adversarial proceeding, thereby waiving that privilege as to *all* "non-opinion work product," including materials that had not been disclosed to the government. *Id.* at 11a-13a.

ARGUMENT

When allegations of wrongdoing surfaced relating to Martin Marietta's charging of travel expenses on government contracts, the company retained independent counsel to conduct a thorough investigation of the allegations, both to discover whether improper practices had occurred that required correction and to help the company prepare for possible civil and criminal litigation growing out of the matter. The attorneys interviewed company employees and prepared reports and analyses. It is undisputed that the materials thus generated were, in the first instance, fully protected by the attorney-client and work-product privileges; and it is well recognized that the conferral of such protection is vitally important to a company's ability to conduct a thorough and effective inquiry. See, *e.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981); *Diversified Indus., Inc.* v. *Meredith*, 572 F.2d 596, 608-611 (8th Cir. 1977) (en banc); cf. *Hickman* v. *Taylor*, 329 U.S. 495, 510-511 (1947).

Here, Martin Marietta's attorneys used the information they had generated to plan the company's defense against the United States Attorney's criminal investigation and the Department of Defense's civil inquiry—precisely the type of use that the attorney-client and work-product privileges are designed to facilitate. In the course of this defense, the attorneys considered it appropriate to disclose to the government some of the information acquired in their internal investigation. These disclosures were part of a settlement process that ultimately led to resolution of both the civil and criminal investigations. This case is about the impact of the disclosures upon the company's privileges.

The court of appeals held that if, in an effort to settle potential civil or criminal charges, a party makes written or oral disclosure to its adversary of some otherwise privileged information gathered by its attorney, that dis-

closure works an implied waiver of both the attorney-client and work-product privileges. The scope of this waiver is breathtakingly broad. It applies not only to the statements actually made or documents actually disclosed in the settlement effort, but also to all *undisclosed* privileged information upon which any statements of counsel were based, provided only that the undisclosed information relates to the same subject matter. Moreover, this implied waiver allows broadened disclosure to be sought not only by the adversary to whom partial disclosure was made, but also by any third party who may desire the materials in a different proceeding.

Review by this Court is essential for a number of reasons. First, the decision below is bound to have significant deleterious effects on settlement negotiations generally and on the ability of companies to conduct thorough, well-documented internal investigations. Second, the decision is gravely flawed and rests on theories that threaten to undermine the legitimate reach of the attorney-client and work-product privileges. Finally, the decision compounds the confusion in the lower courts on the issue of implied waiver of those privileges—a subject that demands clear and comprehensible rules.

I. THE COURT OF APPEALS' DECISION WILL UNJUSTIFIABLY INHIBIT NEGOTIATED SETTLEMENTS AND IMPEDE INTERNAL CORPORATE INVESTIGATIONS

The decision of the court of appeals is one that few lawyers can afford to ignore, for it has a dramatic impact on the process of accumulating privileged information on a client's behalf and using that information to formulate any litigation strategy that includes efforts at settlement. The problem is especially acute for corporate counsel contemplating the kind of extensive, thoroughly documented inquiry conducted by Martin Marietta in this case. If left undisturbed, the decision is bound to

have a considerable chilling effect both on the settlement process and on the ability of companies to conduct these kinds of investigations.

A. Negotiated settlements enjoy a favored position in the American legal system. See, *e.g.*, *Marek* v. *Chesny*, 473 U.S. 1, 5, 10 (1985); *Williams* v. *First Nat'l Bank*, 216 U.S. 582, 595 (1910); *Ahern* v. *Central Pacific Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988); *Autera* v. *Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969); see also Fed. R. Evid. 408 and Advisory Committee Notes; Fed. R. Civ. P. 16(c)(7) and 1983 Advisory Committee Notes; Fed. R. Civ. P. 68. By emphasizing compromise, they tend to reduce the likelihood that one side or the other will suffer extremely harsh results. Furthermore, they greatly lessen the hardships that litigation imposes on the parties and on our already overburdened court system. As the D.C. Circuit has stated, the importance of these benefits makes it incumbent upon courts to "encourag[e] methodology that facilitates compromise." *Autera*, 419 F.2d at 1199.

Thus, courts should exercise caution before adopting any rule of law that would have a dampening effect on settlement negotiations. The Fourth Circuit's broad subject matter waiver theory is such a rule. As the petition correctly notes (at 11-12), representations about an attorney's understanding of pertinent underlying facts—which will in most instances derive in significant part from privileged client communications or the attorney's work product—are a commonplace of the negotiating process. Under the rule adopted by the court below, such representations are likely to strip much of the information gathered by the attorney of its privileged status.

If attorneys need fear a broad waiver of the attorney-client and work-product privileges whenever, during settlement negotiations, they make assertions about the merit of their clients' positions or partially disclose in-

formation gathered in representing the client, they will be far more reluctant to make such assertions. Absent disclosures of this sort, however, both sides will be less able to assess the strengths and weaknesses of their cases and therefore less able to determine whether a particular settlement offer is reasonable. It is precisely for this reason that Fed. R. Evid. 408 and 410 confer privileged status upon statements made in compromise negotiations or during plea bargaining. As the Advisory Committee note to Rule 408 explains, the common law rule allowing evidentiary use of factual statements made in such negotiations was rejected because its "inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers." [1]

It seems incongruous that factual statements made in settlement negotiations should themselves be privileged, but underlying *undisclosed* fruits of an attorney's representational efforts should lose their privileged status by virtue of such statements. Yet that is the import of the court of appeals' decision. Because of the potentially severe impact of the Fourth Circuit's rule on settlements, it is imperative that this Court review that decision to determine whether the injury it threatens to the settlement process is justified by countervailing considerations.

B. The general concern discussed above has special force in the context of government investigations of businesses for compliance with federal statutes and regulations. Such investigations are usually expensive and time-consuming, and cooperation by businesses in policing

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[1] As the court stated in *American Optical Corp.* v. *Medtronic, Inc.*, 56 F.R.D. 426, 431 (D. Mass. 1972) (Levin Campbell, J.):

> Bargaining, like litigation itself, partakes of the adversary procedure. Negotiated settlements are to be encouraged, and bargaining and argument precede such settlements. Clients and lawyers should not have to fear that positions on legal issues taken during negotiations waive the attorney-client privilege so that the private opinions and reports drafted by an attorney for his client become discoverable.

themselves can be extremely valuable to the federal enforcement scheme. Companies that undertake full, uninhibited, and honest internal investigations are more likely to reform their own conduct voluntarily to meet federal requirements. In addition, a willingness to negotiate openly and candidly with the relevant federal enforcement authority can save the government literally millions of dollars in investigational costs and allow it to redirect its resources to other matters that also require investigation.

This benefit of corporate cooperation with government regulators is seriously undermined by the second aspect of the court of appeals' ruling: the holding that the partial disclosure of information gathered by an attorney in preparation for litigation waives the attorney-client and work-product privileges for all material relating to the same subject matter not only as to the government, but also as to everyone else. It is common across a wide range of areas that the government regulates—securities and antitrust being the most visible—that companies are prepared to reach an accommodation with the government but are quite unwilling to compromise their position in existing or potential private civil litigation involving the same matter. But that is exactly what the decision in this case does, by rendering privileged information accessible to private plaintiffs if other, related information has been disclosed to the government.

The government itself has expressed concern that rulings such as this will discourage companies from cooperating with law enforcement investigations. Thus, the director of the Securities and Exchange Commission's Division of Enforcement has stated:

> Recent decisions have removed certainty concerning waiver of the attorney-client privilege by reason of cooperation with the Commission. * * *
>
> Because there is no certainty here, some corporations have been reluctant to participate in a voluntary dis-

> closure program. * * * The dilemma is real. * * * The desire to preserve the applicability of the privilege and work product claims deters some who might otherwise cooperate with a Commission inquiry. This reluctance on their part makes the Commission staff's job more difficult. * * *
>
> A resolution of the waiver theory is important (i) for public policy purposes, (ii) in order to effectively utilize the Commission's limited resources, (iii) in order to encourage participation in the Commission's voluntary disclosure program to correct past disclosure deficiencies for the benefit of investors and permit the staff to verify the accuracy of such corrections, and (iv) to further encourage parties to cooperate with the enforcement staff in connection with informal and formal Commission investigations.

Roundtable: Attorney-Client Privilege in SEC Investigations, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,242, at 85,251-85,253 (Aug. 8, 1982); see also Block & Barton, *Waiver of the Attorney-Client Privilege by Disclosure to the SEC*, 10 Sec. Reg. L. J. 170, 181 (1982) ("Adoption of [the limited waiver] theory would encourage 'corporate housecleaning' for the ultimate benefit of the investing public and would enhance cooperation with the SEC with attendant savings of the Commission's limited time and financial resources.").[2]

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[2] Many of these same concerns underlay the decision by Congress to protect information provided in antitrust investigations in response to civil investigative demands. Recognizing that litigants would bridle at disclosing their indices, digests, and legal analyses of discovery materials to the government if doing so would constitute a waiver of their attorney-client and work-product privileges as to parties other than the government (see H. Rep. No. 870, 96th Cong., 2d Sess., at 8, 11-12 (1980)), Congress provided in the Antitrust Civil Process Act that disclosure of any product of discovery pursuant to a civil investigative demand does not constitute a waiver of any privilege that would have obtained had no disclosure been made. 15 U.S.C. § 1312(c)(2).

C. The implications of the rule adopted by the court of appeals extend beyond the impact on settlements and undermine the incentives for companies to engage in thorough, well-documented investigations of alleged wrongdoing. Such investigations are increasingly recognized as an important part of effective corporate self-governance. See, *e.g.*, Marmaro, *Protecting the Results of Internal Corporate Investigations*, L.A. Law., Nov. 1985, at 36; Mathews, *Internal Corporate Investigations*, 45 Ohio St. L.J. 655, 670-672 (1984); Morvillo, *Voluntary Corporate In-House Investigations—Benefits and Pitfalls*, 36 Bus. Law. 1871 (1981). Those who are responsible for managing a large, modern corporation are often far removed from day-to-day operations. If they are to institute effective reforms to correct abuses and protect their shareholders and customers from the consequences of improper practices, it is important that they have the benefit of the information that uninhibited internal investigations generate.

At the same time, however, responsible corporate officers must take care to avoid exposing the company to liability resulting from the disclosure to litigation adversaries of information gathered in the course of such investigations:

> [G]overnmental or private plaintiffs are increasingly prone to try to short-cut the discovery process by seeking access to the report of the investigation * * *, if such a report exists, and/or to the documentation underlying such a report, including the notes and memoranda of counsel. Because a report and its underlying documentation normally will provide a road-map for those seeking to establish the liability of the corporation and/or its officers and directors, * * * maintaining the confidentiality of these documents frequently becomes a paramount concern.

Block & Barton, *Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel*, 35 Bus. Law. 5, 6 (1979).

By adding materially to the risks of conducting well-documented internal investigations, the Fourth Circuit's implied waiver ruling puts a heavy price on the decision both to conduct such investigations and to use the information thus gathered in an effort to settle with government enforcement agencies. See *Diversified Industries*, 572 F.2d at 611 ("To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."). The problems thus generated require the immediate consideration of this Court.

II. THE COURT OF APPEALS' DECISION FUNDAMENTALLY MISAPPREHENDS THE IMPLIED WAIVER DOCTRINE

The court of appeals' decision entitling Pollard to privileged documents and communications that had never been disclosed to the government was based on the doctrine of implied waiver. See Pet. App. 6a-12a. In the Fourth Circuit's view, Martin Marietta's partial disclosures to the government constituted the kind of "testimonial use" of otherwise privileged information that justified a finding that the attorney-client and work-product privileges had been lost as to all materials related to the same subject matter. Three factors contributed to the court's conclusion that Martin Marietta's use of the privileged materials was testimonial. First, the interests of the federal government and Martin Marietta were decidedly adverse during the proceedings at issue. Second, Martin Marietta supposedly made an express assurance of completeness of its disclosures to the United States Attorney.[3] Third, the disclosures were made in a

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[3] The court of appeals' conclusion that Martin Marietta had made an express assurance of completeness of its disclosures was not based upon a finding of fact by the district court and appears to be contrary to the record. See Pet. App. 35a-36a.

direct attempt to settle active controversies between Martin Marietta and the government. Pet. App. 12a. The court of appeals then assumed, without discussion, that the implied waiver it had found vis-a-vis the government could inure to the benefit of Pollard.

The court of appeals' decision evidences a basic misunderstanding of the implied waiver doctrine. That doctrine provides that a privilege is waived "whenever disclosure of a privileged communication threatens to vitiate the continued 'confidentiality' of the privileged material or would, if the privilege were recognized, be 'unfair' to an opposing litigant." *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450, 1629-1630 (1985). Because the documents that Pollard seeks in this litigation have never been disclosed to anyone outside the company, it is clear that there has been no vitiation of continued confidentiality justifying an implied waiver. Moreover, as we now show, there also has not been any unfair use of the privileged materials of the kind that would entitle Pollard to enforce an implied waiver.

The paradigmatic application of the implied waiver doctrine is when a criminal defendant chooses to testify and then invokes his Fifth Amendment privilege against self-incrimination in an effort to avoid cross-examination. In such circumstances, the cases uniformly hold that the act of testifying impliedly waives the privilege as to all matters reasonably related to the subject matter of the defendant's testimony. See, *e.g.*, *McGautha* v. *California*, 402 U.S. 183, 215 (1971); *United States* v. *Hearst*, 563 F.2d 1331, 1340 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). Similarly, this Court has applied the implied waiver doctrine when a defendant wished to call a private investigator to testify about witness statements contained in a report that the investigator had prepared, yet sought to invoke the work-product privilege to avoid having to disclose the relevant portions of the report for

use in cross-examination. *United States* v. *Nobles*, 422 U.S. 225 (1975). The Court stated that the defendant could "no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination." *Id.* at 240.

Thus, the hallmark of the doctrine of implied waiver is that it responds to an unfair attempt by the privilege-holder to present a factfinder with only part of the picture, while invoking his privilege to prevent his adversary from providing the rest of the picture. Thus, as one court has observed:

> Most of the cases that have found implied waivers involved assertions by a client that made his confidential communications a material issue in a judicial proceeding, circumstances in which it would be patently unfair to uphold a claim of privilege. Where a privilege-holder has made assertions about privileged communications, but has attempted to bar other evidence of those communications, there is a serious danger that his assertions are false or misleading. Thus, where his assertions have been offered on a material issue in a judicial proceeding, his privilege should be revoked at least with respect to any communications whose disclosure might affect the factfinder's judgment as to that issue.

United States v. *Aronoff*, 466 F. Supp. 855, 862 (S.D. N.Y. 1979) (footnote omitted); see also *Developments*, 98 Harv. L. Rev. at 1632-1635. *Nobles* was such a case; this one is not. Accordingly, *Nobles* will not bear the weight placed upon it by the court of appeals.

By basing its conclusion that Martin Marietta had made "testimonial use" of its privileges on three factors that have no apparent relationship to the concept of "testimony," the court of appeals untethered the implied

waiver doctrine from its moorings in the motion that completeness may be needed to ensure fairness. Had the court recognized this fairness underpinning, it could not have found that Martin Marietta had made "testimonial use" of privileged documents and thereby waived the privileges. Rather, it would have realized that any unfairness potentially inhering in the partial disclosure of privileged materials at trial is not present during ordinary settlement discussions. In the former situation, there is a risk that the factfinder will be misled and that the adversary will be prejudiced as a result. In the latter situation, by contrast, there is no risk of prejudice. If the adversary of the privilege-holder—here, the government—believes that it is not being permitted to see the full picture, it can demand further disclosure and, if unsatisfied with the response, walk away from the table and proceed to litigation.[4]

Thus, as the Second Circuit has stated in a case involving public disclosures of facts contained in privileged materials:

> [W]here * * * disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed. * * * Although it is true that disclosures in the public arena may be "one-sided" or "misleading", so long as such disclosures are and remain extrajudicial, there is no *legal* prejudice that warrants a broad court-imposed subject matter waiver. The reason is that disclosures made in public rather than in court—even if selective—create no risk of *legal* prejudice until put at issue in the litigation by the privilege-holder.

In re von Bulow, 828 F.2d 94, 103 (2d Cir. 1987) (emphasis in original); see also *Aronoff*, 466 F. Supp. at 862

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[4] In this case, the government in fact sought further information on some points, and Martin Marietta supplied it. See Pet. 4.

("where * * * the privilege-holder has made assertions about privileged communications not to a factfinder at trial, but to his adversary, before trial, and has not, by any affirmative act, placed these communications in issue, it is harder to justify revoking his privilege as to matters not disclosed").

The court of appeals compounded its error by assuming that the implied waiver it found to have arisen from Martin Marietta's submissions to the *government* was automatically available to *Pollard*. Before concluding that these disclosures effected an implied waiver as to Pollard, the court should have inquired whether they could have resulted in any legal prejudice to him that would in fairness require a waiver. Had it done so, it would have found that Martin Marietta's disclosures, like the disclosures in *von Bulow*, did not create any risk of legal prejudice to Pollard.

Neither Martin Marietta nor the government has sought to use any of the partial disclosures of privileged materials in legal proceedings *against Pollard*, nor could they do so. See Fed. R. Evid. 802; *Palmer* v. *Hoffman*, 318 U.S. 109, 113-115 (1943) (documents prepared in anticipation of litigation do not come within business record exception to the hearsay rule). Therefore, there is no risk in this case that, absent complete disclosure of the privileged documents, a factfinder will be misled to Pollard's detriment by partial disclosures. See *Developments*, 98 Harv. L. Rev. at 1654 ("Just because a corporation has treated the [government] unfairly, or because the [government] was interested in only part of the documents made available to it, does not mean that a subsequent claimant has been treated unfairly."). Because Pollard suffered no legal prejudice as a consequence of Martin Marietta's partial disclosures to the government, there is no basis for the broad subject matter waiver imposed by the court of appeals.

III. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE RULINGS OF OTHER LOWER COURTS

It is essential that lawyers be able to determine with a substantial degree of predictability whether evidentiary privileges are applicable. As this Court observed in *Upjohn*, 449 U.S. at 393:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Similarly, in the context of the work-product privilege, the Court has noted that if attorneys had no assurance that their written "interviews, statements, memoranda, [and] correspondence" would be immune from scrutiny by their adversaries, "much of what is now put down in writing would remain unwritten." *Hickman*, 329 U.S. at 511. See also *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 31 (1983) (Brennan, J., concurring).

In no area is the threat to the attorney-client and work-product privileges posed by uncertainty greater than in the area of implied waivers. As noted above, communications made to counsel, and memoranda prepared by counsel, would be of little value if the attorney could not rely on them in various ways, including in his dealings with opposing counsel. Because selective disclosure of privileged information is often critical to effective representation, especially in the settlement context, it is imperative that counsel be aware of the circumstances under which such voluntary disclosures will lead to the *involuntary* divulgence of additional privileged materials. Yet the lower courts that have addressed the question of implied waiver have given little guidance and offered no predictability; instead, they have adopted

widely varying approaches and reached widely varying results.

For example, the Fourth Circuit's holding in this case is flatly inconsistent with the Second Circuit's ruling in *In re von Bulow*, *supra*. There, plaintiffs in a civil suit alleged that the defendant had waived his attorney-client privilege by publishing a book containing a partial disclosure of communications with his attorney. The Second Circuit disagreed, holding that although the matters disclosed were themselves no longer privileged, related matters not disclosed in this "extrajudicial" context remained confidential and continued to enjoy protection of the privilege. 828 F.2d at 102-103. Here too, Martin Marietta's partial disclosures were wholly "extrajudicial," yet the court below imposed a broad subject-matter waiver.

The lower courts also are divided on the extent to which voluntary disclosures to government agencies waive the attorney-client and work-product privileges. Thus, the D.C. Circuit has held that the privileges are waived not only for submissions to a government agency but also for undisclosed communications on subjects covered by the submissions, where the undisclosed communications are sought by another government agency or a grand jury. See, *e.g.*, *In re Sealed Case*, 676 F.2d 793, 822-824 (D.C. Cir. 1982); *Permian Corp.* v. *United States*, 665 F.2d 1214, 1220-1222 (D.C. Cir. 1981).[5] Another court has gone further and held that submissions to the government effect a subject matter waiver even where discovery is sought by private plaintiffs. See *In re Penn Central Commercial Paper Litig.*, 61 F.R.D. 453,

[5] Contrary to the Fourth Circuit's assertion (see Pet. App. 8a), *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984), did not involve the situation presented here. The D.C. Circuit held that a company that had turned over documents to the SEC could not assert the attorney-client or work-product privileges to prevent private plaintiffs from gaining access to the *same* documents already disclosed. See *id.* at 1370, 1371.

463-464 (S.D.N.Y. 1973). And yet another court has held in a case involving a discovery request by a private plaintiff that disclosure to the government waives the attorney-client privilege as to all communications on the same subject matter unless, at the time of disclosure, the privilege-holder has specifically reserved the right to assert the privilege in subsequent proceedings. See *Teachers Ins. & Annuity Ass'n of Am.* v. *Shamrock Broadcasting Co.*, 521 F. Supp. 638, 645 (S.D.N.Y. 1981).

On the other hand, some cases involving grand jury subpoenas have held that the privileges are waived only for the submissions themselves, not for undisclosed communications covering the same subject matter. See *In re Grand Jury Subpoena Duces Tecum Dated March 24, 1983*, 566 F. Supp. 883, 884 (S.D.N.Y. 1983); *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 372 (E.D. Wis. 1979). And yet other cases involving discovery requests by private plaintiffs have held that the privileges are waived with respect to neither the submissions nor confidential communications covering the same topics. See, *e.g.*, *Diversified Indus.*, 572 F.2d at 611; *Byrnes* v. *IDS Realty Trust*, 85 F.R.D. 679, 688-689 (S.D.N.Y. 1980).

The Eighth Circuit's decision in *Diversified* is particularly difficult to square with the decision below. In that case, as here, a third party sought access to the privileged fruits of an internal corporate investigation on the ground that disclosures about the investigation had been made to the SEC. The Eighth Circuit held that the voluntary disclosure of privileged documents to a government agency did not waive the privilege as to a private party seeking the same documents. 572 F.2d at 611. *A fortiori*, the privilege was not waived for documents other than those disclosed. This case is identical to *Diversified* in all relevant respects.

Finally, the lower courts are in disagreement as to the effects of disclosures made during settlement negotia-

tions. Thus, some courts have held that disclosures made during settlement discussions with a private party waive the attorney-client and work-product privileges as to undisclosed documents sought by another private party. See *Burlington Indus.* v. *Exxon Corp.*, 65 F.R.D. 26, 45 (D. Md. 1974); *International Business Machines Corp.* v. *Sperry Rand Corp.*, 44 F.R.D. 10, 13 (D. Del. 1968). Other courts have refused to find such a waiver either as to the party to whom partial disclosure had been made or as to third parties. See *Aronoff*, 466 F. Supp. at 862-863; *Sylgab Steel & Wire Corp.* v. *Imoco-Gateway Corp.*, 62 F.R.D. 454, 457-458 (N.D. Ill. 1974), aff'd, 534 F.2d 330 (7th Cir. 1976); *American Optical Corp.* v. *Medtronic, Inc.*, 56 F.R.D. 426, 431 (D. Mass. 1972). And at least one court has employed a balancing test to find a waiver as to a limited set of documents on the same subject matter as a document disclosed during settlement negotiations, while declining to find a waiver as to a broader group of documents on the same subject. See *AMCA Int'l Corp.* v. *Phipard*, 107 F.R.D. 39, 44 (D. Mass. 1985).

In sum, the lower courts are in substantial disarray on a matter of immense practical importance, and the court of appeals' decision in this case contributes greatly to that confusion. Exacerbating the chilling effects of this state of confusion is the unlikelihood that the courts of appeals will be able to provide continuous guidance to district courts faced with waiver issues. Because discovery orders are interlocutory, privilege issues seldom reach the appellate courts, and district courts frequently have the final say on such matters. As the petition explains (at 22-24), this case presents a rare opportunity for the Court to address the waiver question and to bring much-needed certainty and uniformity to this area. For that reason, and because the decision below is plainly wrong and will have severe adverse repercussions in the settlement of litigation, this Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1989

MOTION
MAR 13

No. 88-1157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARTIN MARIETTA CORPORATION,
Petitioner,

v.

WILLIAM C. POLLARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association ("ABA") moves pursuant to Rule 36.1 of the rules of this Court for leave to file the annexed brief as *amicus curiae* in support of the petition for certiorari filed by Martin Marietta Corporation on or about January 12, 1989. The ABA wishes to support the petitioner's position that the Fourth Circuit's decision is important enough to merit plenary review. The ABA believes that the annexed brief will be of assistance to the Court. Although counsel for petitioner Martin Marietta Corporation consented to the filing of this brief, the consent of counsel for respondent Pollard was

requested but refused. The ABA therefore requests leave to file the annexed brief as *amicus curiae.*

Respectfully submitted,

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March 13, 1989

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OCTOBER TERM, 1988

MARTIN MARIETTA CORPORATION,

Petitioner,

v.

WILLIAM C. POLLARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION

INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") is a private association that serves as a spokesperson for the legal profession in this country. The scope of the attorney-client and work-product privileges is a matter that has long been of concern to the ABA and its members. In the past, the ABA has filed briefs as *amicus curiae* in *Hickman v. Taylor,* 329 U.S. 495 (1947), and *Upjohn Co. v. United States,* 449 U.S. 383 (1981), two of the leading cases delineating the contours of these privileges.

[1] This brief is accompanied by a Motion for Leave to File, consent of respondent having been requested but refused.

The issue raised in this case,[2] concerning implied waiver of the attorney-client and work-product privileges in the course of plea discussions with the government, is of comparable importance to the organized bar.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision creates substantial uncertainty concerning both the existence and the scope of the implied waivers of the attorney-client and work-product privileges. This uncertainty in the law significantly impairs the ability of lawyers to provide responsible, effective legal representation and to give informed guidance to clients on matters relating to potential and ongoing litigation. Clarification of the law is critical to the interests of the organized bar and to the clients it serves.

The Fourth Circuit held that by disclosing to the government the results of an internal investigation of possible corporate wrongdoing, Martin Marietta Corporation impliedly waived its attorney-client and work-product privileges, with the result that Pollard, a third party, would be entitled to discovery of the documents on which Martin Marietta's representations to the government were based. The circuit court found the situation similar to those in which partial disclosure of privileged information is made during direct examination at trial.[3] The D.C. Circuit has taken a similarly broad view of waivers of the evidentiary privileges made outside the context of trial. *See In re Sealed Case,* 676 F.2d 793, 822-24 (D.C. Cir. 1982); *Permian Corp. v. United States,* 665 F.2d 1214, 1220-22 (D.C. Cir. 1981).

In contrast to the Fourth and D.C. Circuits, other courts have concluded that the scope of an implied waiver of the

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[2] *In re Martin Marietta Corporation,* 856 F.2d 619 (4th Cir. 1988).

[3] 856 F.2d at 624-26 (discussing *United States v. Nobles,* 422 U.S. 225 (1975)).

attorney-client or work-product privilege is very narrow when disclosures of privileged information are made outside the trial setting. *See, e.g., In re von Bulow,* 828 F.2d 94, 101-03 (2d Cir. 1987); *Diversified Indus., Inc. v. Meredith,* 572 F.2d 596, 611 (8th Cir. 1977) (*en banc*). These courts have determined that when a party discloses privileged information outside the judicial context, the party does not waive its privileges with respect to other information that was not disclosed, even if the undisclosed information concerns precisely the same subject matter as that which was disclosed.

The present unsettled state of the law is of concern to members of the bar and to the legal profession for several reasons. It is of concern to trial lawyers; in the course of litigation, lawyers customarily engage in settlement or plea negotiations, which the law generally encourages.[4] Attorneys and their clients need to know whether disclosures of privileged information made to the opposing party in such negotiations will result in the loss of attorney-client or work-product protection for the undisclosed underlying information and documents. In counseling clients and representing them in negotiations, trial lawyers are hampered by not knowing whether limited disclosures to the opposing party will later make it impossible to defend against demands for far broader disclosures made either by the opposing party itself or by third parties who become involved in future litigation.

The present state of uncertainty is also of concern to attorneys for corporate clients. In order to adequately advise corporate clients whether to undertake internal investigations, attorneys must know the extent to which the product of those investigations will be privileged. At present, attorneys for nationally-based corporations, which may be subject to rules of

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[4] *See, e.g.,* Fed. R. Evid. 408 (evidence of a settlement offer is inadmissible to prove liability); Fed. R. Evid. 410 (statements made in the course of plea discussions are generally inadmissible).

privilege which vary from court to court, are at a disadvantage in counseling clients and conducting corporate investigations.

The ABA believes that the comparatively limited case law at the federal appellate level concerning the issue raised by this case does not adequately reflect the importance of the issue, particularly because of the growth of corporate investigations and the ever-broadening scope of discovery under the Federal Rules of Civil Procedure. Questions concerning the scope of implied waivers of the attorney-client privilege generally arise in the course of discovery and usually are addressed only by the trial court, often in an unpublished order. The uncertainty of the law also influences the conduct of trial lawyers and corporate counsel in ways that are not overtly reflected in litigation but which have profound consequences for underlying litigation strategy. The ABA therefore believes that the Fourth Circuit's decision raises an issue of nation-wide significance that merits this Court's attention.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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